Supreme Court, U.S.
FILED
96 769 OCT 8 1996
OFFICE OF THE CLERK

(1)

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
TERM 1996

Robert S. Mirin,
Petitioner, Pro Se

v.

Paul Eyerly, III, and
Press Enterprises Newspaper,
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Robert S. Mirin, Esq.
Pro Se Petitioner
8150 Derry Street
Harrisburg, PA 17111-5260

29 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the use of 28 U.S.C. §1927 to impose sanctions constituted an unwarranted judicial expansion of the statute to judicially convert it to a fee shifting statute.

II. Whether the amount of sanctions imposed upon Attorney Robert S. Mirin were lawful or reflect an abuse of discretion by the Trial Court.

PARTIES TO THE PROCEEDING

Petitioner:

Robert S. Mirin, Esquire, Pro Se

Respondents:

Press-Enterprise, Inc. and Paul Eyerly, III

TABLE OF CONTENTS

PAGE(S)

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS . . . 2

STATEMENT OF THE CASE 2

1. NATURE OF THE CONTROVERSY 2

2. SUMMARY OF FACTS 3

3. PROCEEDINGS BELOW 5

A. Appeal to the United States Court of Appeals for the Third Circuit . . . 5

B. Relief sought 6

REASONS FOR GRANTING THE WRIT OF CERTIORARI . 6

A. The Record Does not Support the Imposition of Sanctions Under Any Existing Standard. 9

B. Courts Have Limited the Application of §1927 Which is Penal in Nature. . . 10

C. The Amount of Sanctions Imposed was Excessive and Inappropriate. . . . 16

D. The Record Discloses the Learned Senior Judge's Abuse of Discretion. 17

TABLE OF AUTHORITIES

Campana v. Muir, 615 F.Supp. 871 (M.D.Pa. 1985) 11,13,17

Chudasana v. Mazda Motor Corp., 4:93-CV-61-COL (M.D.Georgia, 626-95) 17

Employment Div. Dep't of Human Resources of Oregon, et al. v. Smith, et al., 110 S.Ct. 1595 (1990) 12

Freeman v. Local Union No. 135 Chauffeurs, 746 F.2d 1316, 1322 (7th Cir. 1984) 14

Gaiardo v. Ethyl Corp., 835 F.2d 479 (3d Cir. 1987) 11

GRiD Sys. Corp v. John Fluke Mfg. Co., 41 F3d 1318 (9th Cir. 1994) 19

Jones v. Pittsburgh Nat'l. Corp., 899 F.2d 1350 (3rd Cir. 1990) 11

Nanreb v. Hatch, 827 F.2d 1329 (9th Cir. 1987) 14

Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d. Cir. 1986) 14

Sassower v. Field, 973 F.2d 75 (2d Cir. 1992) 15,16

Sendi v. NCR Comten, Inc., 624 F.Supp 1205 (E.D.Pa 1986) 7

United States v. Levin, 964 F.2d 1214 (D.C. Cir. 1992) 15

Van Berkel v. Fox Farm, 581 F.Supp. 1248 (D.Minn. 1984) 15

Younger v. Harris, 401 U.S. 37 (1971) 20

Stephen P. Burbank, "Studies of Justice System Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11" (AM. JUDICATURE Soc'y 1989). 20-21

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
TERM 1996

Robert S. Mirin,
Petitioner, Pro Se

v.

Paul Eyerly, III, and
Press Enterprises Newspaper,
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the United States Court of Appeals for the Third Circuit concerning the Petition for Rehearing of a June 12, 1996 Memorandum and Decision to strike the imposition of sanctions as inappropriate and unsupported as set forth in Appendix A.

In so doing the United States Court of Appeals for the Third Circuit denied the Petition for Rehearing.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit denying the Petition for Rehearing was entered in the July Term, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

In addition, this Court is authorized, pursuant to 28 U.S.C. §1651(a) to issue all writs, necessary or appropriate in all of its jurisdictions.

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. §1927 provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

STATEMENT OF THE CASE

1. NATURE OF THE CONTROVERSY.

Michael Boykin was hired in November 1992 by Bloomsburg University. His wife Margaret Boykin had recently been hired as Director of the University Police. The Boykins are both Black. On December 21 or 22, 1992 Michael Boykin was suspended from his job pending an investigation of allegations by another University employee, Virginia McAfee, that he raped her at a December 18, 1992 Christmas party on the University grounds. On January 11, 1993, Michael Boykin was arrested by the State and charged with rape and related crimes. In the

year prior to the Boykins' arrival in Bloomsburg, there had been three rapes of Bloomsburg University students. According to the Boykins, Bloomsburg University officials, the Columbia County District Attorney, and various state police troopers caused public statements to be made defaming Michael Boykin which left the impression that he was the "serial rapist of Bloomsburg."

On October 28, 1993, following a jury trial in Columbia County Court, Michael Boykin was acquitted of the criminal charges against him.

On March 2, 1994, Michael Boykin, his wife Margaret and their son Aaron, represented by Petitioner Robert S. Mirin, Esq., filed a lawsuit in federal court alleging claims under various civil rights statutes (42 U.S.C. §§1981, 1983, 1985(3), and 1986), Title VII, the Pennsylvania Human Relations Act and state tort law against various defendants, including the University of Bloomsburg, various officials and employees of the University of Bloomsburg, state police officers, the local district attorney, and a local newspaper and its publisher. Two months later, the Boykins were compelled by motion of certain defendants, under state law, to file a virtually identical complaint in state court which was removed to federal court and consolidated with the original action.

On this appeal, Petitioner Robert S. Mirin, Pro Se, challenges the January 19, 1995 order imposing sanctions on him, as plaintiff's counsel, for bad faith, harassment and delay in filing "patently frivolous" claims in the excessive amount of $52,980.47.

2. SUMMARY OF THE FACTS.

The underlying action commenced with the filing of a Writ of Summons in the Pennsylvania Court of Common Pleas for Columbia County on

January 11, 1994. The Writ referenced Appellees "Bloomsburg University defendants," the "state police defendants," and Press Enterprise (the local newspaper) and Paul Eyerly as publisher of Press Enterprise, Inc. (the "Media Defendants") and Virginia McAfee, David Fenton, her paramour and Sallie Samsel, her sister. Initially, the Media Defendants ruled Plaintiffs to file a complaint. In response, a complaint was filed in federal court.

The Media Defendants were the only defendants who lodged a rule to file a complaint in the Common Pleas Court for Columbia County at that time. In response thereto, the complaint was filed on March 2, 1994, in the Williamsport, Pennsylvania division of the United States District Court for the Middle District of Pennsylvania pursuant to 18 U.S.C. §3231 and 28 U.S.C. §1331. The Media Defendants, alone, responded to the first complaint and filed motions under Rule 12(b)(1) and (6) seeking to dismiss the complaint. On March 2, 1994, Plaintiff's had initiated suit in the Middle District of Pennsylvania by filing a federal complaint. The Complaint alleged violations of 42 U.S.C. §§1981, 1983, 1985, and 1986, as well as violation of Title VII and a series of pendent state claims. The Media Defendants filed a 12(b)(1) and (6) motion.

On April 20, 1994, even though named in Boykin I; the remaining defendants ruled plaintiff to file the second, state court, complaint (Boykin II). Plaintiffs were thus constrained, by state procedure, to file a virtually identical state court complaint (Boykin II).

On May 17, 1994, the federal district court dismissed all claims against the Media Defendants in Boykin I(Press Enterprise and Paul Eyerly). On May 31, 1994 the Bloomsburg University Defendants petitioned for removal of

the second/state court complaint (Boykin II) to the federal district court. As noted above, the state court complaint (Boykin II) was virtually identical to the first federal complaint (Boykin I) which was filed in response to the Media Defendant's rule.

Several months after disposition of the Media Defendant's 12(b)(1) and (6) motions, subsequent sanctions hearings were scheduled and held. Sanctions in the amount of $52,980.47 were imposed on Counsel ostensibly pursuant to 28 U.S.C. §1927. Bias against Appellants and civil rights litigation in general, was demonstrated by the judge's conduct directed against Petitioner, Robert S. Mirin, reprimanding Petitioner for imaginary interruptions, and blatantly treating opposing counsel with great deference, as well as, the Judge's ruling reflecting an abuse of discretion and blatant errors of law. These erroneous rulings resulted in the draconian sanctions order. (See Appendix C)

3. PROCEEDINGS BELOW

A. Appeal to the United States Court of Appeals for the Third Circuit., Nature of Action, and Basis for Jurisdiction.

Petitioner filed a Petition for Rehearing to reconsider the June 1996 Memorandum and Decision to strike the imposition of sanctions as inappropriate and unsupported at Case No. 95-7456 in the United States Court of Appeals for the Third Circuit.

Jurisdiction was properly in the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1291 which confers jurisdiction over appeals on the Federal Court of Appeals from all final decisions of the District Courts residing within the circuit.

B. Relief sought

The relief requested of this Court, as well as the relief sought from the court below, is a review of the District Court's January 19, 1995 order imposing sanctions on Petitioner for bad faith, harassment and delay in filing "patently frivolous" claims. (See Appendix C)

The Petitioner sought a Petition for Review from the United States Court of Appeals for the Third Circuit of the aforementioned Order of the District Court. (See Appendix B) The Court of Appeals ordered and adjudged that the Petition for Review was denied. (See Appendix A)

Reasons for Granting the Writ

I. This Court should grant this petition for writ of certiorari and exercise its power of supervision over the United States court of appeals which has sanctioned the departure of accepted and usual course of judicial proceedings.

Sanctions under 28 U.S.C. §1927, ostensibly governing counsel's liability for excessive costs, should not be imposed against Petitioner for filing a second state court complaint (Boykin II) that was identical to a previously filed federal complaint (Boykin I). The underlying action commenced with the filing of a Writ of Summons in the Pennsylvania Court of Common Pleas for Columbia County on January 11, 1994. Initially, the Media Defendants ruled Plaintiffs to file a complaint. In response, a complaint was filed in federal court. (Boykin I)

On April 20, 1994, even though named in Boykin I; the Bloomsburg University defendants

ruled plaintiff to file the second, state court, complaint (Boykin II). Plaintiffs were thus constrained, by state procedure, to file a virtually identical state court complaint (Boykin II).

On May 17, 1994, the federal district court dismissed all claims against the Media Defendants (Press Enterprise and Paul Eyerly in Boykin I). On May 31, 1994 the Bloomsburg University Defendants petitioned for removal of the second/state court (Boykin II) complaint to the federal district court. The state court complaint was virtually identical to the first complaint (Boykin I) which was filed in response to the Media Defendant's rule.

The Court in Sendi v. NCR Comten, Inc., 624 F.Supp 1205 (E.D.Pa 1986) addressed a similar fact pattern. In Sendi, the Court ruled that although counsel's litigation tactics were not entirely unwarranted. In 1984, Sendi filed a complaint alleging that Comten's acceptance of his resignation violated the Pennsylvania Wage Payment and Collection Law, 43 P.S. §260.1 et. seq. Sendi v. NCR Comten, Inc., No. 84-2114 (E.D. Pa. filed May 2, 1984) (Sendi I). On June 10, 1985 Sendi moved for leave to amend his complaint to add counts of breach of contract. The motion was denied and summary judgment was granted for the defendant.

On October 10, 1985 Sendi filed a second lawsuit (Sendi II). Defendant moved to dismiss the Sendi II complaint, which was identical to the proposed amended complaint in Sendi I, on the ground that it is barred on res judicata. The Court in Sendi II granted defendant's motion to dismiss.

Defendant also moved for sanctions against plaintiff and his counsel pursuant to Fed.R.Civ.P. 11 and 28 U.S.C. §1927. The Court in Sendi II stated that although the decision to file a second suit was ill-advised, the

plaintiff and his counsel did not act so unreasonably as to justify imposition of sanctions. The Court in Sendi II accepted counsel's representation that he brought Sendi II in an attempt to prevent the statute of limitations from running on plaintiff's contractual claims. The Court thereby denied defendant's request for sanctions. Sendi v. NCR Comten, Inc., 624 F.Supp 1205 (E.D.Pa 1986)

As in Sendi, petitioner in the case at bar avers that the use of the state court writ of summons procedure and the initial federal complaint involved satisfaction of the state court statute of limitations for limited components of this litigation. (i.e. the libel, slander, and invasion of privacy aspects of the conduct at issue were governed by the one year statute of limitations under Pennsylvania law. 42 Pa.C.S.A. §5523.) The balance of the claims under §§1981, 1983, 1985, and 1986 and the other state law claims have a longer two (2) year statute of limitations. See, 42 Pa.C.S.A. §5524

In the case at bar, the sanctions issue arose in the context of a pending state court Motion to Strike an improperly entered judgment/related of non pros filed by the Media Defendants based upon the fact that Boykin I was filed in federal rather than state court. The filing of Boykin II, as an identical complaint, involved counsel's concern over the possibility of waiver by implication if Press Enterprise and Eyerly was not named in the state complaint. Subsequently, given the then interlocutory disposition of the first complaint, as to Press Enterprise and publisher Paul Eyerly, there was a risk that the Court would view any deletion of Press Enterprise and the editor from the second complaint as a waiver of all claims against those defendants. Thus, if the second complaint became the operative complaint in Federal Court, a waiver argument could have resulted from

deletion of the newspaper and editor in the second/removed complaint and an arguable or potential loss of appeal right could have resulted from any deletion.

In addition, the second complaint, state court complaint (Boykin II), was filed in response to the procedural demand of the Commonwealth Defendants, who were already before the Federal Court in Boykin I. It should be noted that the complaint which involved separate federal court and state court filings were virtually identical and therefore, no additional response or extreme expense to the second complaint was required.

It is respectfully submitted that the reach of 28 U.S.C. §1927 does not extend to such state court proceedings and that the state court complaint, compelled by the Commonwealth Defendants and thereafter removed by Commonwealth Defendants to Federal Court, did not reflect willful bad faith, duplicative or any vexatious conduct on the part of Plaintiff's counsel. The supremacy clause and the scope of §1927 preclude issuance of sanctions on the basis of a compelled state court complaint. In addition, the second complaint should not have engendered any additional work for Defendants Eyerly or Press Enterprise.

A. <u>The Record Does Not Support the Imposition of Sanctions Under Any Existing Standard.</u>

This case was the first case for Petitioner Mirin under the 1993 Amendments to the Federal Rules of Civil Procedure which took effect in 1994 and the first courtroom involvement with this particular judge. The procedures at issue, in the context of the joint case management order, were being employed for the first time, pursuant to the amendments of the Federal Rules,

effective January 1, 1994.

Petitioner made a good faith effort to comply with the extensive directions reflected in the joint case management protocol, including efforts to deal with five different defense counsel spread throughout the Commonwealth of Pennsylvania, in locations ranging from Philadelphia, Pennsylvania to Altoona, Pennsylvania. The defendants and defense counsel (unsanctioned) evaded the joint case management process and submitted their own improper joint case management protocol or plan in contravention to the newly established case management procedures. Counsel made every effort to schedule the pre-conference meeting and in fact requested extensions of time in order to accomplish this meeting.

The judge demonstrated bias and arbitrary predisposition in terms of the mechanics of the hearing and by virtue of his scheduling a limitation of four (4) hours a day. This contributed to the "extended" number of days which Petitioner Mirin (based in Harrisburg, PA) and Philadelphia counsel found themselves attached in Williamsport, Pennsylvania.

The learned judge below further demonstrated bias and predisposition not only within the sanctions hearing themselves but in the handling of the underlying case, by ignoring recorded documents, failing to apply clear law of the Supreme Court, failing to recuse himself, and by failing to give any consideration or weight to the evidence and or statements of Petitioner or Plaintiff's witnesses.

Neither the facts nor the law support the imposition of sanctions in this matter and it is respectfully submitted that the decision below is defective as a matter of law and unsupported in the record and must be reversed. This use of §1927 also will chill appropriate creative advocacy in civil right's cases.

B. Courts Have Limited the Application of §1927 Which is Penal in Nature.

Courts have limited the application of §1927 which is penal in nature. The decision below improperly converted §1927 from a penal type of provision to a cost shifting statute. A summation of the controlling authority in the jurisdiction is exemplified in several Third Circuit decisions. In Jones v. Pittsburgh Nat'l. Corp., 899 F.2d 1350 (3rd Cir. 1990), the court stated that a showing of bad faith on the part of the attorney is required in order to impose §1927 sanctions. Additionally, in Gaiardo v. Ethyl Corp., 835 F.2d 479 (3d Cir. 1987), the court held that willful bad faith was a precondition to the imposition of attorney's fees under §1927.

There is no evidence of willful bad faith on part of Petitioner. The second complaint filed by Petitioner, discussed above, was necessary for the adequate representation of his clients, appellants--Michael Boykin, Margaret Boykin and Aaron Boykin. The preservation of certain conditions and claims of the plaintiff's cause of action that may have tolled under the appropriate statute of limitations was nothing beyond the adequate and zealous representation owed from an attorney to his/her client.

A three part analysis may be applied to issues arising under §1927. Campana v. Muir, 615 F.Supp. 871 (M.D.Pa. 1985) which involves the same trial judge. Section 1927 being penal in nature, requires, inter alia, a finding of "willful bad faith on the part of the offending attorney". In this particular case, the practice order was issued pursuant to new amendments to the Federal Rules, and involved defense attorneys scattered throughout the state. The record reflects that Plaintiff's counsel made efforts to conduct the pre-case

management conference to the extent of requesting an extension of time and was simply unable to do so.

Ostensible deficiencies within the hearing process itself were, in part, the product of the fact that this was the first occasion when counsel appeared in court under the supervision of the Honorable Malcolm Muir. Upon elucidation from the Judge, counsel after two relevant days of litigation, returned to Harrisburg from Williamsport, in each case and worked into the early morning hours in order to provide the court with items such as a reformatted listing of 95 documents on a court exhibit form and on an earlier occasion, to promptly produce further proposed findings of fact, as directed by the Court.

Substantively, the legal theory articulated under the synthesis of Judge Bork's proposed natural law jurisprudence and Employment Div. Dep't of Human Resources of Oregon, et al. v. Smith, et al., 110 S.Ct. 1595 (1990) was predicted upon a functional analysis of the framer's First Amendment issues which focused upon "seditious" libel or political speech. Such a reading would limit the scope and reach of First Amendment protections. Furthermore, the Smith-peyote case appeared to alter fifty years of First Amendment jurisprudence and integrate First Amendment privilege more fully into a general scheme of social responsibility limiting the presses' abuse of First Amendment privileges.

The referenced physical absence of newspaper articles from the complaint was explained, in the sanctions record, as involving time frames and the articles mechanical unavailability as distinguished from their existence. Ultimately, several hundred newspaper articles were produced to show the notoriety and scope of asserted libel and invasion of privacy.

The second complaint filed in state court and removed to federal court was the product of Commonwealth defendants action. It was identical to the first complaint and should not have involved any additional work, analysis or effort on the part of counsel for Press Enterprise or Paul Eyerly. They had already briefed all of the 12(b)(1) and (6)issues raised by the first complaint which, as noted, was identical to the second complaint.

The question of petitioner's motive, given the tight time sequences between the removal of the second complaint and Judge Muir's disposition of the first complaint and the removal of the second complaint, which originated in state court, also involves the related state court non-pros judgment issue. The second complaint was configured so as to avoid any argument or issue of possible waiver arising from the omission of the Press Enterprise or Eyerly from the second suit. Those factors, when coupled with Plaintiff's offer to dismiss defendant Eyerly personally and any functional analysis establishes that no additional work for Defendants should have been necessary, given the court's joinder of the two virtually identical complaints. The record as a whole, suggests that Petitioner was engaged in a vigorous effort to advance the law in view of Smith and to provide an avenue of recourse to a client that had suffered very serious injuries.

The second component of Campana's three prong test is the multiplication of proceedings. On these facts, application of §1927 raises issue under the supremacy clause to the Constitution, inasmuch as the allegedly multiplicative proceeding was lodged in state court and required, based upon the action of the Commonwealth and removed to the Federal Court by the Commonwealth defendants. Thus, it was not counsel's doing but rather a response on

counsel's part to protect the interests of the client from any possible argument of waiver that generated the second complaint.

The third analytical prong of Campana is an increased cost requirement. As to this factor, it should be noted that an examination of Boykin I and Boykin II would have led any recent law graduate to conclude that the 12(b)(1) and (6) issues were identical. Disposition of the first complaint, disposed of the second complaint. The mechanical filing of the identical complaint in state court, occasioned by the demand of the Commonwealth Defendants and necessitated by the need to protect the interest of the client from any waiver or related argument, were apparent.

Other jurisdictions have declined to apply §1927 in similar situations. In Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d. Cir. 1986), the Second Circuit held that a sanction under §1927 "must be supported by a finding of bad faith similar to that necessary to invoke the court's inherent power." Also, in Freeman v. Local Union No. 135 Chauffeurs, 746 F.2d 1316, 1322 (7th Cir. 1984), the Court refused to award monetary sanctions under §1927 because there was "no indication of subjective bad faith on the part of plaintiff's attorney." At a minimum, most cases require a showing of recklessness on the part of an attorney. The Ninth Circuit in Nanreb v. Hatch, 827 F.2d 1329 (9th Cir. 1987), required a finding that an attorney acted in bad faith or recklessly.

The use of §1927 sanctions is limited to extreme behavior by attorneys that is designed to delay proceedings. According to the federal case law dealing with §1927, in those cases where sanctions were imposed, the conduct engaged in by the attorneys was extreme. The conduct usually involved willful acts designed to delay proceeding, or to harass the opposing party, or involved the filing of unfounded

claims. Here counsel proceeded on a complex claim--promptly and in good faith. For example, counsel unsuccessfully sought only brief additional time to arrange the newly mandated joint case management conference.

In Van Berkel v. Fox Farm, 581 F.Supp. 1248 (D.Minn. 1984), the court imposed §1927 sanctions on an attorney who failed to dismiss a lawsuit after learning that it was barred by the statute of limitations. The court noted that this multiplied the proceedings "unreasonably and vexatiously." The Second Circuit in Sassower v. Field, 973 F.2d 75 (2d Cir. 1992), held that §1927 sanctions were appropriate because the pro se litigant, who was an attorney, filed recusal motions in an attempt to interfere with proceedings, made motions to reargue virtually every issue which was ruled against them, filed improper interlocutory appeals, and made personal attacks on opposing parties and counsel. The conduct in Sassower was so severe that the district court stated that the Sassower had "pursued this litigation as if it was a holy war and not a court proceeding, managed those proceedings in a fashion that vexatiously, wantonly and for oppressive reasons increased the legal fees enormously." Id., Even in the face of such outrageous behavior, the court sanctioned Sassower less than $55,000.00.

The Court of Appeals for the District of Columbia Circuit, in United States v. Levin, 964 F.2d 1214 (D.C. Cir. 1992) held that §1927 sanctions were inappropriate, and reversed the order imposing sanctions. In this case, six days before trial, the attorney realized that he had forgotten the subpoena the witnesses he intended to present. While he was in the midst of another trial, he had his investigator serve the subpoena, but learned on the eve of trial that they had in fact not been served. The attorney than met with the judge and opposing counsel and

advised them that he might still be ready. However, he was not ready and was sanctioned for this failure under §1927. On appeal, the D.C. Circuit held that this conduct, or lack thereof, while it constituted negligence, did not reach the level of bad faith, and reversed the sanctions order.

In the present case, Petitioner's actions did not involve bad faith or reckessness. There was no showing of bad faith on the part of petitioner nor showing that petitioner acted recklessly so as to multiply the proceedings. Multiplication of proceedings was the product of Commonwealth action first compelling then removing the complaint from state to federal court. All steps and procedures taken by the attorney were necessary for adequate representation of his clients. Therefore, §1927 does not apply to this case.

C. The Amount of Sanctions Imposed was Excessive and Inappropriate.

Courts have held that the financial status of the attorney must be considered when it awards monetary sanctions against the attorney under §1927. In Sassower, the court held that "when a court awards defendant's attorney's fees, it must take into account the financial circumstances..."

In the present case, not only is the imposition of sanctions in the amount of $52,980.47 inappropriate, but the amount of sanctions are excessive based upon petitioner's financial resources. Of the $52,980.47, in excess of $19,000 is alleged to be for work in response to the second complaint and in excess of $32,000 for time spent on sanctions hearings that consisted of four(4) hour litigation days. Due to the amount of sanctions imposed, petitioner was forced to file for Chapter 13

bankruptcy on May 23, 1995. The necessity for invoking bankruptcy protection evidences inability to immediately pay the sanctions imposed. The District Court's sanction order was unfairly oppressive, and excessive. Additionally, the District Court Judge approved the unreasonable and excessive hourly rate of attorney's fees imposed on petitioner. See Campana v. Muir, 615 F.Supp. 871 (M.D.Pa. 1985) which may explain the learned Judge's antipathy towards civil rights claims, and Chudasana v. Mazda Motor Corp., 4:93-CV-61-COL (M.D.Georgia, 626-95)

The evidence in the sanctions hearing disclosed that none of the Philadelphia counsel were "expert" or possessed special expertise in the sanctions area and that the use of three (3) lawyers to prepare and litigate the sanction allegations at a combined hourly rate in excess of $700.00 an hour was excessive and inappropriate; especially when experienced counsel were available in the Williamsport area for approximately $100.00 per hour.

The decision does not offer any reasonable explanation of how Movants expended in excess of $19,000.00 in billable time in connections with a response to a virtually identical second complaint--A complaint which was mandated under State law by the actions of the Commonwealth of Pennsylvania ruling that Plaintiff's file a second complaint.

D. The Record Discloses the Learned Senior Judge's Abuse of Discretion.

The decision of the lower Court does not address any of the 293 instances during the sanctions hearings when the Court systematically interrupted Petitioner and demonstrated bias and predisposition concerning the handling of Plaintiff's case. (See Appendix "D") These 293

citations to the sanctions record, taken together, reflect systematic interruption of Petitioner by the court. Since the court issued its sanctions findings without the benefit of transcript and prepared findings prior to the completion of the October week of testimony, the Senior Judge's apparent hearing and comprehension deficit are significant indicators of serious deficiencies replete in the sanction's determination and assessment.

The disposition of the Court does not address any of the 98 referenced incidents where the senior judge in question demonstrated a hearing deficit and/or comprehension deficit concerning the proceedings in the courtroom. (See Appendix D)

These citations to the record reflect the frank confusion of the learned senior judge below as to the information disseminated and events occurring in the courtroom; further supporting the inference that the judge's findings constitute an arbitrary abuse of sanctions.

The decision does not address any of the 49 cited instances where the judge demonstrated a predisposition and bias against Petitioner in the presentation of a civil rights case. (See Appendix D)

Counsel was precluded from developing a record to defend against allegations of bad faith imposed under the Court's inherent authority and jurisdiction concerning sanctions as to matters before the lower court.

The decision, without record citation or analysis was prepared, in substantial part, prior to the completion of Appellant's case, mischaracterizes counsel's testimony in the sanctions hearing, testimony which did not consume any more than a total of four hours of testimony out of the seven (7) and one half - half days, which was characterized as extending

the hearings concerning the imposition of sanctions under 28 U.S.C. §1927. The general references, passim, to the length of hearings contained no discussion or analysis of the limitations of the hearing day imposed by the sitting senior judge, the actual extent of counsel's testimony, nor the extent to which the proceedings involved with Petitioner's case or testimony. For example, there is not a single citation to the record to support the undocumented assertion that the replies of counsel (Appellant) were inappropriately evasive or inappropriately lengthy and the assertion is not supported in the decision of the Lower Court or it's conclusions which are without any citation to the record.

It was not explained, in the decision, why the described sequence of events did not provide a reasonable basis in fact and law for the defamation or privacy claims involved. Although, the Court notes, in passing, that the Plaintiffs did not even live in the area during the period of time when the so-called serial rapes were committed, the related underlying claims and legal theory were dismissed without any analysis.

The Senior Judge, at the time of the hearings, admitted that he had a hearing impairment and diabetes at the time of the proceedings. These conditions which can and do affect the ability of anyone to perceive and digest complex intellectual proceedings.

No where in the decision is there an explanation of how the Respondents initially managed to generate in excess of $19,000 in billable time in connection with a response to the virtually identical (state) second complaint. A complaint which was mandated under State law by the actions of the Commonwealth of Pennsylvania ruling Plaintiffs and requiring the second complaint.

The decision of the Court does not address comity issues in the sense that the allegedly duplicative complaint, which was compelled by State court process of a third party, and was identical to the first complaint filed an removed by a third party (the Commonwealth) to the Federal Court. See GRiD Sys. Corp v. John Fluke Mfg. Co.,, 41 F3d 1318 (9th Cir. 1994). The use of state court process as a basis for §1927 sanctions violates the principles of comity and ordered federalism. See Younger v. Harris, 401 U.S. 37 (1971).

The lower court's 23 page opinion and decision is devoid of specific record references or examples and was announced prior to the completion of the hearing process. The decision reflects a persistent pattern of clear error and abuse of discretion.

It is also significant that the Third Circuit itself is aware of recent evidence suggesting a serious problem in this area within the Circuit. Stephen P. Burbank, "Studies of Justice System Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11" (AM. JUDICATURE Soc'y 1989). While principally analyzing Rule 11, the report suggests a serious problem. The report

> "tend[s] to confirm much more frequent invocation of Rule 11 against plaintiffs that against defendants (66.7% vs. 33.3%) and more frequent imposition of sanctions on plaintiffs than defendants (15.9% vs. 9.1%). The former finding is statistically significant at a level less than 1%, but the latter is not statistically significant. When *sua sponte* impositions are included, however, the disparity becomes significant, again at a level less than 1%. As we have noted, 77.8% (21/27) of all sanctions

imposed in the survey period were imposed on plaintiffs (and/or their counsel). . . .

Id. at 65.

"[P]laintiff's (and/or their counsel) were sanctioned on motion in civil rights (including employment discrimination) cases in our survey at a rate (8/17 or 47.1%) that is considerably higher than the rate (6/71 or 8.45%) for plaintiffs in non-civil rights cases." Id. at 69. "This finding is statistically significant at a level of less than 1%." Id. at 69 n.19. "Moreover, leaving uncounselled *pro se* plaintiffs out of account, counselled civil rights plaintiffs in our sanction survey were sanctioned on motion at a rate (5/11 or 45.5%) far higher than the rate for counselled plaintiffs in non-civil rights cases (6/69 or 8.7%) -- a difference that is statistically significant at a level of less than 1%." Id. at 71.

"Sanctions seem particularly sensitive to the extent that those involved in civil rights litigation are the less fortunate among us and their champions. For this group any monetary sanctions may be regarded as punishment, and full expense-shifting may entail massive over-deterrence." Id. at 71-72 "The possibility of statutory fee-shifting in favor of defendants may diminish the *in terrorem* effect of [sanctions]. But that is not an answer to our concerns. . . . The existence of a pro-plaintiff fee-shifting status designed to ensure the availability of a pool of competent counsel is an independent reason to use [sanctions] sparingly, in order to avoid . . . conflict with Congress' policy judgments. . . ." Id. at 72. The report went on to observe that sanctions are not "intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Id. at 84.

WHEREFORE, Petitioner respectfully requests this Honorable Court to reconsider the June 12, 1996 Memorandum and Decision and strike the imposition of the excessive sanctions as inappropriate and unsupported.

Respectfully submitted,
MIRIN & JACOBSON

By:_____
Robert S. Mirin, Esq.
Attorney ID #25305
8150 Derry Street
Harrisburg, PA 17111-5260
(717) 561-1515

(2)

FILED

96 769 OCT 8 1996

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
TERM 1996

Robert S. Mirin,
Petitioner, Pro Se

v.

Paul Eyerly, III, and
Press Enterprises Newspaper,
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX

Robert S. Mirin, Esq.
Pro Se Petitioner
8150 Derry Street
Harrisburg, PA 17111-5260

88 pp

UNITED STATE COURT OF APPEALS FOR
THE THIRD CIRCUIT
NO. 95-7456

MICHAEL BOYKIN; MARGARET L. BOYKIN; AARON M. BOYKIN

V.

BLOOMSBURG UNIVERSITY OF PENNSYLVANIA; DR. ROBERT PARRISH, VICE PRESIDENT; DR. CURTIS ENGLISH, PRESIDENT; DR. HARRY AUSPRICH, FORMER PRESIDENT; MARGARET MANNING, DIRECTOR OF PERSONNEL; IRVIN WRIGHT; ASSOCIATE PROFESSOR; JOHN WALKER, RETIRED VICE PRESIDENT FOR UNIVERSITY ADVANCEMENT; TIMOTHY DOWNS; SUPERVISOR, PLUMBING AND MAINTENANCE; VIRGINIA MCAFEE, EX-UNIVERSITY EMPLOYEE; DAVID FENTON; SALLIE SAMSEL, UNIVERSITY EMPLOYEE LT. DEBORAH BARNES, UNIVERSITY POLICE FORCE; WILLIAM S. KREISHER, ESQUIRE; CAPTAIN WESLEY WAUGH, TROOP H, STATE POLICE, HAZLETON BARRACK, PENNSYLVANIA; UNKNOWN STATE TROOPERS AND AGENTS; CAPTAIN LARRY SMITH, CHIEF OF POLICE, BLOOMSBURG, PENNSYLVANIA; ALL IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES; PAUL EYERLY, III, PUBLISHER, PRESS ENTERPRISE NEWSPAPER; CHARLES CONFER

Michael Boykin; Margaret Boykin;
Aaron Boykin; Robert S. Mirin,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. NO. 94-CV-00306)
DISTRICT JUDGE: HON. MALCOLM MUIR

SUBMITTED PURSUANT TO THIRD CIRCUIT LAR 34.1(A)
MAY 20, 1996

BEFORE: SLOVITER, CHIEF JUDGE, SAROKIN
AND ROSENN, CIRCUIT JUDGES

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, SAROKIN, and ROSENN,[1] Circuit Judges

The petition for rehearing filed by Appellant Robert S. Mirin in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied

By the Court,

Dated: Jul. 10 1996 Chief Judge

---

[1]Hon. Max Rosenn, Senior Circuit Judge, as to panel rehearing only.

UNITED STATE COURT OF APPEALS FOR
THE THIRD CIRCUIT
NO. 95-7456

MICHAEL BOYKIN; MARGARET L. BOYKIN; AARON M. BOYKIN

V.

BLOOMSBURG UNIVERSITY OF PENNSYLVANIA; DR. ROBERT PARRISH, VICE PRESIDENT; DR. CURTIS ENGLISH, PRESIDENT; DR. HARRY AUSPRICH, FORMER PRESIDENT; MARGARET MANNING, DIRECTOR OF PERSONNEL; IRVIN WRIGHT; ASSOCIATE PROFESSOR; JOHN WALKER, RETIRED VICE PRESIDENT FOR UNIVERSITY ADVANCEMENT; TIMOTHY DOWNS; SUPERVISOR, PLUMBING AND MAINTENANCE; VIRGINIA MCAFEE, EX-UNIVERSITY EMPLOYEE; DAVID FENTON; SALLIE SAMSEL, UNIVERSITY EMPLOYEE LT. DEBORAH BARNES, UNIVERSITY POLICE FORCE; WILLIAM S. KREISHER, ESQUIRE; CAPTAIN WESLEY WAUGH, TROOP H, STATE POLICE, HAZLETON BARRACK, PENNSYLVANIA; UNKNOWN STATE TROOPERS AND AGENTS; CAPTAIN LARRY SMITH, CHIEF OF POLICE, BLOOMSBURG, PENNSYLVANIA; ALL IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES; PAUL EYERLY, III, PUBLISHER, PRESS ENTERPRISE NEWSPAPER; CHARLES CONFER

Michael Boykin; Margaret Boykin;
Aaron Boykin; Robert S. Mirin,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. NO. 94-CV-00306)
DISTRICT JUDGE: HON. MALCOLM MUIR

SUBMITTED PURSUANT TO THIRD CIRCUIT LAR 34.1(A)
MAY 20, 1996

BEFORE: SLOVITER, CHIEF JUDGE, SAROKIN
AND ROSENN, CIRCUIT JUDGES

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on May 20, 1996.

On consideration whereof, if is now here ordered and adjudged by this Court that the judgment of the District Court pursuant to its opinion and order dated May 17, 1994, the judgment of the district court entered on January 19, 1995, and the three judgments of the district court pursuant to its opinions and orders dated July 7, 1995 be, and the same are, hereby affirmed.

Costs taxed against Appellants.

Attest:

_____

Clerk

UNITED STATE COURT OF APPEALS FOR
THE THIRD CIRCUIT
NO. 95-7456

MICHAEL BOYKIN; MARGARET L. BOYKIN; AARON M. BOYKIN

V.

BLOOMSBURG UNIVERSITY OF PENNSYLVANIA; DR. ROBERT PARRISH, VICE PRESIDENT; DR. CURTIS ENGLISH, PRESIDENT; DR. HARRY AUSPRICH, FORMER PRESIDENT; MARGARET MANNING, DIRECTOR OF PERSONNEL; IRVIN WRIGHT; ASSOCIATE PROFESSOR; JOHN WALKER, RETIRED VICE PRESIDENT FOR UNIVERSITY ADVANCEMENT; TIMOTHY DOWNS; SUPERVISOR, PLUMBING AND MAINTENANCE; VIRGINIA MCAFEE, EX-UNIVERSITY EMPLOYEE; DAVID FENTON; SALLIE SAMSEL, UNIVERSITY EMPLOYEE LT. DEBORAH BARNES, UNIVERSITY POLICE FORCE; WILLIAM S. KREISHER, ESQUIRE; CAPTAIN WESLEY WAUGH, TROOP H, STATE POLICE, HAZLETON BARRACK, PENNSYLVANIA; UNKNOWN STATE TROOPERS AND AGENTS; CAPTAIN LARRY SMITH, CHIEF OF POLICE, BLOOMSBURG, PENNSYLVANIA; ALL IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES; PAUL EYERLY, III, PUBLISHER, PRESS ENTERPRISE NEWSPAPER; CHARLES CONFER

Michael Boykin; Margaret Boykin;
Aaron Boykin; Robert S. Mirin,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. NO. 94-CV-00306)
DISTRICT JUDGE: HON. MALCOLM MUIR

SUBMITTED PURSUANT TO THIRD CIRCUIT LAR 34.1(A)
MAY 20, 1996

BEFORE: SLOVITER, CHIEF JUDGE, SAROKIN
AND ROSENN, CIRCUIT JUDGES

MEMORANDUM OPINION OF THE COURT

SLOVITER, CHIEF JUDGE.

Michael Boykin was hired in November 1992 as a groundskeeper at Bloomsburg University. His wife, Margaret Boykin had been recently hired as the Director of the University Police. The Boykins are both Black. On December, 21 or 22, 1992 Michael Boykin was suspended from his job pending an investigation of allegations by another University employee, Virgina McAfee, that he raped her at a December 18, 1992 Christmas party on the University grounds. On January 11, 1993, Michael Boykin was arrested by the State and charged with rape and related crimes. In the year prior to the Boykins' arrival in Bloomsburg, there had been three rapes of Bloomsburg University Students. According to the Boykins, Bloomsburg University officials, the Columbia County District Attorney, and various state police troopers caused public statements to be made defaming Michael Boykin which left the impression that he was the "serial rapist of Bloomsburg"

On October 28, 1993, following a jury trial in Columbia County Court, Michael Boykin was acquitted of the criminal charges against him. The University subsequently reinstated him to his prior position as groundskeeper and provided him back pay to the date of his suspension, although the Boykins contend that this back-pay award did not make him entirely whole because he was not paid for overtime that he would have worked.

On March 2, 1994, Michael Boykin, his wife Margaret and their son Aaron filed this lawsuit in federal court alleging claims under various civil rights statutes (42 U.S.C. §§1981, 1983, 1985(3) and 1986) Title VII and the Pennsylvania Human Relations Act and state law tort against

various defendants, including the University, various officials, and employees of the university, state police officers, and the local district attorney, and a local newspaper and its publisher. Two months later, the Boykins filed a virtually identical complaint in the state court which was removed to federal court and consolidated with the original action.

The district court dismissed all counts against the Bloomsburg Police Chief and the state police troopers by various orders entered in 1994 and 1995. These orders were not appealed by the Boykins. on this appeal , the Boykins challenge the following orders of the district court: 1) its May 17, 1994 order dismissing all claims against the newspaper, the Press Enterprise and Paul Eyerly III (its publisher); 2) its three orders of July 7, 1995 granting summary judgment in favor of district attorney William Kreisher, Bloomsburg University, and all of the officials and employees thereof named as defendants in the suit (Dr. Robert Parrish, Dr. Curtis English, Dr. Harry Ausprich, Margaret Manning, Irvin Wright, John Walker, Timothy Downs, Sallie Samsel, Deborah Barnes, and Virginia McAfee) on the federal and Pennsylvania Human Relations act claims and remanding the remainder of the case to state court; and 3) its January 19, 1995 order imposing sanctions on plaintiffs counsel for bad faith, harassment and delay in filing "patently frivolous" claims.

This court has the jurisdiction pursuant to 28 U.S.C. §1291.[2] Our review of the district

---

[2]On review of the docket, this court noted that the claims against one of the many defendants, David Fenton, were never disposed of by the district court. After we called this matter to the attention of the parties, plaintiffs filed a motion in the district court

court rulings on defendants' motions to dismiss and for summary judgment is plenary. With respect to the imposition of sanctions, the district court's finding of bad faith is a factual determination which we review only for clear error. Quiroga v. Hasbro, Inc., 934 F.2d 497, 505 (3d Cir. 1991). Once a proper finding of bad faith has been made, the decision to impose sanctions is reviewed for an abuse of discretion. See id.

Although it is evident that these events caused significant pain to Mr. Boykin and his family, after careful consideration of all of the contentions raised by appellants we will affirm the orders of the district court, essentially for the reasons contained in its opinion.

With respect to the sanctions order, we additionally note that although the imposition of sanctions in the amount of $52,980.47 on plaintiff's attorney seems at first blush a harsh measure, we are convinced that this decision was quite reasonable under the circumstances. In a 23-page opinion, the district court described in detail the "bad faith, harassing, and vexatious" conduct engaged in by Mr. Mirin which "multiplied the proceedings...unreasonably and vexatiously," and therefore warranted the imposition of sanctions under 28 U.S.C. § 1927. We need not delve into such detail here. The record makes clear that the district court was reasonable in finding that "[p]laintiffs had no basis in fact or law for their defamation claims and their assertion

---

for voluntary dismissal of David Fenton, and on May 28,1996 the district court entered an order dismissing the action against Fenton without prejudice. Thus, this appeal is from a final order disposing of all claims.

of civil rights offenses against the media defendants was patently frivolous." Boykin v. Bloomsburg University, 905 F. Supp. 1335, 1347 (M.D. Pa. 1995).

Additionally, the district court found that "[t]he sanctions hearing, which totalled seven days including the 6-day initial hearing and 1 day supplemental hearing, was inordinately delayed by the unreasonable conduct of Mr. Mirin and his grossly evasive and lengthy answers to questions while on the stand...[his] constant and flagrant interruptions of this Court, despite repeated warnings...[and his] repeated attempts to offer evidence remote and irrelevant to the issues before the Court," id at 1348, including his attempt to offer evidence of the "so-called 'Fishing Creek Conspiracy' during the Civil War," id. at 1344.

We recognize that the amount of sanctions imposed here is large. However, once a district court judge has determined that sanctions are appropriate, the amount of such sanctions is left to his or her discretion. Ford v. Temple Hospital, 790 F.2d 342, 347 (3d Cir. 1986). In this case, the district court judge properly used the lodestar method of calculating fees, and took into account all proper factors. Thus, we cannot say that he abused his discretion.

In sum, our review of the record reveals ample evidence of Mr. Mirin's bad faith conduct in instituting and unreasonably prolonging this action against the Media Defendants. We therefore hold that the district court's imposition of sanctions was well within its discretion.

For the foregoing reasons, we will affirm the orders of the district court.

TO THE CLERKS:

Please file the foregoing opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL R. BOYKIN, et al.,	:	
Plaintiffs	:	No. 4:CV-94-306
v.	:	Complaint Filed 3/2/94
BLOOMSBURG UNIVERSITY OF PENNSYLVANIA, et al.,	:	(Judge Muir)
Defendants	:	

OPINION
January 19, 1995

I. Introduction

This order relates to a motion for sanctions against Robert S. Mirin, counsel for the Plaintiffs, filed by Defendants Press-Enterprise, Inc. and Paul Eyerly, III, publisher of Press-Enterprise ("media defendants").

A hearing on the motion commenced Friday, October 21, 1994. Mr. Mirin was the sole witness the entire day. During the day the Court stated that Mr. Mirin's answers were extremely lengthy, that the proceedings were moving slowly, and that if

the hearing was not terminated by 4:15 p.m. on the 6th hearing day, the Court would terminate it at that time. The earing concluded on the sixth hearing day, October 28, 1994, at 4:12 p.m.

During the last day of the hearing, the Court set filing dates for proposed supplemental findings of fact, objections and briefing.

At the conclusion of the hearing, the Court made oral findings of fact and stated oral conclusions of law, reserving the right to supplement the same after consideration of the above-scheduled filings. those oral findings and conclusions are embodied in our order of October 30, 1994, and are interspersed within our findings of fact set forth below.

On November 7, 1994, the media defendants filed proposed supplemental findings of fact and a supplemental submission and affidavit in support

thereof. On November 14, 1994, Mr. Mirin filed objections to the media defendants' proposed supplemental findings of fact. On November 18, 1994, the media defendants filed a brief in opposition to Mirin's objections. No reply brief was filed.

On December 9, 1994, at the request of Mr. Mirin, we held a second hearing to address the proposed supplemental findings of fact submitted by the Media Defendants on November 7, 1994. The hearing concluded at 4:30 p.m. on December 9, 1994.

At the conclusion of the hearing, we established a filing deadline of December 23, 1994, for the submission of additional proposed findings of fact and conclusions of law with respect to the issues raised at the second hearing. On December 13, 1994, we issued an order in which reduced our oral order of December 9, 1994 to writing and also allowed for the submission of additional proposed supplemental findings of fact and conclusions of law with respect

to the first hearing.

On December 21, 1994, we granted Mr. Mirin's motion for an extension of time to file his additional proposed supplemental findings of fact and conclusions of law. On December 23, 1994, the media defendants filed their additional proposed supplemental findings of fact and conclusions of law. On December 30, 1994, Mr. Mirin filed his additional proposed findings of fact and conclusions of law. This matter is ripe for disposition. The following are the Court's findings of fact, discussion, and conclusions of law with regard to the issues raised.

II. Findings of Fact.

1. Plaintiffs in the above action are Michael R. Boykin, Margaret L. Boykin and Aaron M. Boykin, all individuals residing at 203 Glenn Avenue, Bloomsburg, Pennsylvania. (Undisputed, hereinafter "U")

2. Counsel for Plaintiffs in the

above action is Robert S. Mirin, Esquire, of Mirin & Jacobson, P.C. 8150 Derry Street, Harrisburg, PA 17111-5260. (U)

3. Plaintiffs commenced an action in state court on January 11, 1994, by filing a Praecipe for Writ of Summons in the Court of Common Pleas of Columbia county, Pennsylvania, C.A. No. 31-1994. (U)

4. Writs were issued in plaintiffs' state court suit to Bloomsburg University and eight other Bloomsburg related officials and individuals (hereinafter "the Bloomsburg defendants"), along with several Pennsylvania state troopers and other state actors.

5. Paul Eyerly, III (hereinafter "Eyerly"), the publisher of the Press-Enterprise, also was named as defendants in plaintiffs' state court action.

6. Press-Enterprise, Inc. (hereinafter Press-Enterprise") publishes the Press-Enterprise, a newspaper of general circulation in Bloomsburg,

Pennsylvania and surrounding areas. (U)

7. Eyerly and Press Enterprise, Inc. are hereinafter referred to as the "media defendants."

8. On January 24, 1994, defendant Eyerly praeciped the Court for a Rule directing plaintiffs to file a Complaint against him in the state court action. (U)

9. On January 24, 1994, the Columbia County Prothonotary executed the Rule, ordering plaintiffs to a Complaint against Eyerly within 20 days after service of the rule. (U)

10. On February 8, 1994, counsel for defendant Eyerly served plaintiffs by placement in first-class U.S. Mail on that date with the Rule from the Columbia County Prothonotary.

11. Plaintiffs did not file a Complaint with the Columbia County Prothonotary by March 2, 1994, as directed by the Rule issued by the Court of Common Pleas.

12. On March 2, 1994, defendant Eyerly praeciped the Court to enter a Judgment of Non Pros against plaintiffs for failing to comply with the state court Rule. (U)

13. On March 2, 1994, the Prothonotary of the Court of Common Pleas of Columbia County entered an Order granting a Judgment of Non Pros against plaintiffs, thereby dismissing Eyerly as a defendant from the action. (U)

14. On March 2, 1994, plaintiffs initiated the instance action by filing a Complaint in the Middle District of Pennsylvania, No. 4:CV-94-306 ("Boykin I"), naming several other defendants, including Eyerly and the Press-Enterprise. (U)

15. The parties have continuously referred in their papers and in their testimony to the action filed in this Court on March 2, 1994, as Boykin I and the action instituted January 11, 1994, in the Court of Common Pleas of Columbia County and removed to this Court on May 31, 1994,

as Boykin II. (Because of the use of these designations in undisputed facts, we will retain those designations despite the confusion obviously engendered).

16. In Boykin I, plaintiffs alleged that the publication of certain unidentified news articles by the Press-Enterprise violated the federal civil rights laws, including sections 1981, 1983, 1985 and 1986 of Title 42, as well as violated Title VII.

17. In their Boykin I federal court Complaint, plaintiffs also alleged state law claims against the media defendants, including defamation and invasion of privacy. (U)

18. The civil rights claims and pendent libel and invasion of privacy allegations in the Boykin I federal complaint were of a general nature, and no newspaper articles were identified in the complaint.

19. No newspaper articles were

physically attached as exhibits in the Boykin I federal Complaint. (U)

20. On March 31, 1994, the media defendants filed a Motion to Dismiss plaintiffs' Complaint with this Court. (U)

21. In the Motion to Dismiss, the media defendants argued, among other things, that plaintiffs' state law libel and privacy claims were time barred under the applicable one year statute of limitations and that plaintiffs' libel and privacy claims were legally insufficient. (U)

22. As of March 23, 1994, plaintiff's counsel was put on notice that the media defendants contended that plaintiffs' state law libel and privacy claims were time-barred under the applicable one year statute of limitations.

23. After the media defendants agreed to give plaintiffs a ten day extension to respond, on April 18, 1994, plaintiffs filed their brief in opposition to the

motion to dismiss. (U)

24. On April 20, 1994, in the earlier state court action initiated by Writ of Summons, the Bloomsburg University defendants, by the Commonwealth attorney, praeciped the Columbia County Prothonotary to Rule plaintiffs to file a Complaint as to the Bloomsburg defendants or suffer a Judgment of Non Pros. (U)

25. On April 20, 1994, the Columbia County Prothonotary issued a Rule to plaintiffs ordering them to file a Complaint with respect to the Bloomsburg defendants within 20 days after service of the Rule. (U)

26. In response to the Rule, plaintiffs filed a Complaint ("Boykin II") in the Columbia County state court action, No. 31-1994, on or about May 9, 1994. (U)

27. In this state complaint which is virtually identical to the federal complaint in Boykin I, in addition to naming the Bloomsburg defendants and

several other state actors, plaintiffs also identified the Press-Enterprise as a defendant for the first time.

28. The state court Rule issued on April 20, 1994, did not require plaintiffs to file a complaint as to the media defendants.

29. Plaintiffs also named Paul Eyerly, III, as publisher, as a defendant in this Complaint, despite that when the Complaint was filed, the prior March 2, 1994 Order non prossing plaintiffs as to defendant Eyerly and dismissing Eyerly from the action remained a valid, standing Order. (U)

30. Plaintiff's Boykin II Complaint was virtually identical to the previous Boykin I Complaint filed in the Middle District of Pennsylvania. (U)

31. The Boykin I and Boykin II Complaints allege identical claims of defamation and invasion of privacy against the media defendants. (U)

32. No newspaper articles were identified in the body of the Boykin II Complaint.

33. No newspaper articles were attached as exhibits to the Boykin II Complaint.

34. On May 16, 1994, counsel for the media defendants wrote to plaintiffs' counsel, Robert S. Mirin, Esquire, informing him that in defense counsel's view plaintiffs had engaged in procedural maneuvers calling in question their "good faith." (U)

35. The media defendants contend that their May 16, 1994 letter to plaintiffs' counsel put him on notice that the media defendants intended to seek counsel fees and sanctions, if plaintiffs would not dismiss their claims against the media defendants in Boykin II. (U)

36. On May 17, 1994, this Court dismissed all claims against the media defendants in Boykin I. (U)

37. The Court's May 17, 1994 Memorandum stated that plaintiffs' libel and privacy claims against the media defendants were barred by the applicable one-year statute of limitations. (U)

38. The Court's May 17, 1994 Memorandum stated that plaintiffs' libel and privacy claims against the media defendants "failed to meet the most basic pleading requirements" and that the Complaint failed to allege the necessary elements to sustain such claims. (U)

39. The Court's May 17, 1994 Memorandum stated that plaintiffs' federal civil rights claims under §§ 1985 and 1986 "were devoid of merit" and that plaintiffs failed to allege sustainable claims against the media defendants. (U)

40. The Court's May 17, 1994 Memorandum stated that plaintiffs Complaint failed to allege sustainable § 1981 or § 1983 claims as to the media defendants. (U)

41. On May 31, 1994, the Bloomsburg defendants successfully petitioned the Court to remove the state court Boykin II Complaint to the Middle District of Pennsylvania, No. 4:CV-94-817, at which time plaintiff's Motion to Strike the Judgment of Non Pros was pending. (U)

42. On June 1, 1994, plaintiffs filed an Application for Reconsideration of the federal Court's May 17, 1994 Order and Memorandum, dismissing all claims against the media defendants in the Boykin I Complaint. (U)

43. Prior to filing a 12(b)(6) Motion with respect to the Boykin II Complaint, pursuant to Middle District Rule 7.1, the media defendants contacted the offices of plaintiffs' counsel to ask that he withdraw his claims voluntarily against Eyerly and the Press-Enterprise, but plaintiff's counsel was unavailable. (U)

44. On June 7, 1994, the media defendants were required under the Federal

Rules to file either a responsive pleading or a 12(b) Motion to Dismiss with respect to the removed Boykin II Complaint. (U)

45. On June 7, 1994, the media defendants filed a 12(b)(6) Motion to Dismiss Plaintiffs' Boykin II Complaint on the grounds that: (a) plaintiffs' claims against the media defendants were identical to the claims previously dismissed on their merits by this Court; (b) plaintiffs' state law libel and privacy claims were time barred under the applicable one year statute of limitations and were legally insufficient; and (c) plaintiff failed to state a claim for a federal civil rights violation. (U)

46. The media defendants subsequently contacted plaintiffs' counsel again to seek his concurrence to the motion to dismiss filed in Boykin II, and plaintiffs' counsel agreed to dismiss the claims against Eyerly only. (U)

47. On June 15, 1994, the Court

ordered Boykin I and Boykin II to be consolidated under Civil Action No. 4:CV-94-306. (U)

48. On June 30, 1994, plaintiffs filed a Brief in Support of Plaintiffs' Motion for Reconsideration.

49. In plaintiffs' Brief in Support of Plaintiffs' Motion for Reconsideration, plaintiffs admitted that their state law libel and invasion of privacy claims were barred by the applicable statute of limitations. Further, plaintiffs also admitted with respect to this same issue that "the law of Pennsylvania is against them." Brief in Support at 2.

50. In plaintiffs' Brief in Support of Plaintiffs' Motion for Reconsideration, plaintiffs' argument as to the reason why the Court should reconsider its decision with respect to plaintiffs' libel and privacy claims is "that the law of Pennsylvania is unjust and should be changed." Brief in Support at 2.

51. On July 18, 1994, this Court denied plaintiffs' Motion for Reconsideration with respect to the above matter. (U)

52. In the Court's July 18, 1994 Order, it held that the media defendants' motion to dismiss the Boykin II Complaint was deemed to be moot because the two cases had been consolidated. "U"

53. In a previous state court action filed in Columbia County, Pennsylvania, not including the Boykins, plaintiffs' counsel, Robert S. Mirin, Esquire, filed a suit on November 11, 1993, on behalf of plaintiff, George Mitchell. (U)

54. As was the case in Boykin, the Complaint filed in Mitchell named multiple defendants and asserted federal civil rights violations and pendent state claims. (U)

55. The Mitchell complaint, inter alia, also asserted libel and invasion of privacy claims against

defendant Press Enterprise, Inc. (U)

56. The Complaint filed in Mitchell v. Bloomsburg Univ. of Pa., et al., No. 1674-93, was removed to the Middle District of Pennsylvania on December 3, 1993, and is presently in discovery. (U)

57. Three of the articles attached to the Complaint were published more than one year before plaintiff initiated suit in Mitchell. (U)

58. On December 9, 1993, Press-Enterprise filed a Motion to Dismiss all claims against it in the Mitchell action. (U)

59. In its Motion to Dismiss, Press-Enterprise put plaintiff on notice of its contention that three of the articles on which its defamation and invasion of privacy claims were based were time barred by the statute of limitations and that these claims were legally deficient.

60. Plaintiff was also put on notice in this same Motion to Dismiss that one of

the articles upon which plaintiff's defamation and invasion of privacy claims were based was not published by the Press-Enterprise. (U)

61. On January 14, 1994, in lieu of responding to the Press-Enterprise's 12(b)(6) Motion to Dismiss, plaintiff Mitchell filed an Amended Complaint. (U)

62. In the Amended Complaint filed in Mitchell, plaintiff's counsel deleted plaintiff's libel claims, but continued to assert claims for invasion of privacy against the Press-Enterprise. (U)

63. One of the articles attached to the Amended Complaint filed in Mitchell, entitled "President responds to issues," was not published by the Press-Enterprise. (U)

64. On March 4, 1994, defendant Press-Enterprise filed a Motion to Dismiss Plaintiff's Amended Complaint in Mithcell. (U)

65. In this second Motion to Dismiss,

the Press-Enterprise again put plaintiff on notice of its contention that three of the articles on which its invasion of privacy claims were based were time barred by the statute of limitations and that their claim with respect to the remaining article was legally deficient. (U)

66. On April 15, 1994, the Honorable James F. McClure, Jr., United States District Judge for the Middle District of Pennsylvania, issued a Memorandum Opinion in Mitchell granting the Press-Enterprise's 12(b)(6) Motion to Dismiss, dismissing all claims against the Press-Enterprise with prejudice. (U)

67. Judge McClure's April 15, 1994 Memorandum Opinion stated that four of the articles on which plaintiff's invasion of privacy claims were based were published more than one year prior to plaintiff's commencement of the Mitchell action. (U).

68. Judge McClure's April 15, 1994 Memorandum Opinion stated that four of the

articles on which plaintiff's invasion of privacy claims were based were barred by the statute of limitations. (U)

69. Judge McClure's April 15, 1994 Memorandum Opinion stated that plaintiffs' claims on the only remaining article that was not time-barred, could not reasonably be read to portray plaintiff in a false light. (U)

70. Pursuant to Paragraph 2 of this Court's Order No. 1 of March 2, 1994, it was plaintiffs' counsel's obligation to arrange an attorneys' conference to discuss and submit a Case Management Plan.

71. Pursuant to Paragraph 1 of this Court's Order No. 2 of March 4, 1994, the date set for a case management conference with the Court was June 30, 1994.

72. On June 8, 1994, the Court advanced the case management conference to 9:00 a.m. on June 29, 1994.

73. On June 8, 1994, Plaintiff moved to extend the time to file the case

management plain to July 1, 1994, and to hold the case management conference on July 8, 1994, which motion was granted by Order of June 27, 1994.

74. On July 7, 1994, the day before the scheduled case management conference, plaintiffs' counsel filed in Harrisburg a motion for a continuance of the case management conference which was denied.

75. The case management conference was held at 4:00 p.m. on July 8, 1994.

76. Despite plaintiffs' counsel being given an extension of time to arrange an attorneys' conference to discuss and prepare a Case Management Plan, none was arranged by plaintiffs' counsel.

77. Plaintiffs' counsel failed to fulfill his obligation to arrange an attorneys' conference to discuss the Case Management Plan.

78. Plaintiffs' counsel failed to participate in preparing the Case Management Plan filed in the above

captioned matter.

79. Counsel for plaintiffs, Robert S. Mirin, Esquire, did not have in his possession any articles, claimed to be false and defamatory, at the time he filed the Boykin I Complaint on March 2, 1994.

80. Counsel for plaintiffs, Robert S. Mirin, Esquire, did not have in his possession any articles, claimed to be false and defamatory, at the he filed the Boykin II Complaint on May 9, 1994.

81. Counsel for plaintiffs, Robert S. Mirin, Esquire, did not have in his possession any articles, claimed to be false and defamatory, at the time he refused to dismiss the Boykin II Complaint on May 17, 1994.

82. Counsel for plaintiffs, Robert S. Mirin, Esquire, was unable to identify a single Press-Enterprise article in his possession at the time he instituted the Boykin I or Boykin II actions.

83. Counsel for plaintiffs, Robert S.

Mirin, Esquire, refused to dismiss the Boykin II Complaint filed on May 9, 1994, although he recognized that he was proposing three novel legal theories for which he could advance no existing legal precedent or legal support.

84. Counsel for plaintiffs, Robert S. Mirin, Esquire, refused to dismiss the Boykin II Complaint although he recognized that he was proposing three novel legal theories already rejected by the undersigned judge in Boykin I.

85. Counsel for Plaintiffs, Robert S. Mirin, Esq., proposed to change Pennsylvania law to reflect that the statute of limitations on a claim for defamation should run from the date of discovery of the offending language by plaintiff rather than from the date of publication.

86. Counsel for Plaintiffs, Robert S. Mirin, Esq., proposed to change Pennsylvania's law regarding the media's

privilege to republish fairly and accurately the official disseminations of public officials at official press conferences.

87. Counsel for Plaintiffs, Robert S. Mirin, Esq., proposed to create law to the effect that the media could be held accountable for violations of a criminal defendant's civil rights if it, through lack of reasonable diligence, failed to uncover and publish facts favorable to the defendant.

88. The legal theories enunciated above by plaintiffs' counsel were pursued in bad faith.

89. The legal theories enunciated above by plaintiffs' counsel were maintained in bad faith.

90. Robert S. Mirin's clients would in no way have been prejudiced by dismissal of the Boykin II Complaint as it presented issues identical to those raised in the Boykin I Complaint.

91. Robert S. Mirin's grossly evasive answers to questions while on the stand on October 21, 1994, and October 24, 1994, were unconscionable and delayed these proceedings unreasonably.

92. Some of Robert S. Mirin's answers to questions posed by counsel for the media defendants and the Court were deceptive.

93. Some of Robert S. Mirin's explanation for his conduct in this litigation lacks credibility.

94. Robert S. Mirin's filing of a suit against Paul Eyerly, III, in Boykin II was in bad faith, vexatious, and harassing.

95. The failure of Robert S. Mirin to dismiss Press-Enterprise from Boykin II on May 17, 1994 was without basis, and was vexatious, harassing and in bad faith.

96. Robert S. Mirin's refusal to dismiss the Boykin II Complaint as to the Press-Enterprise on May 17, 1994 and thereafter, in the face of this Court's Order of May 17, 1994, and Mr. Mirin's

admission that he could not point to a specific Press-Enterprise article in his possession claimed to be false and defamatory was in bad faith, harassing, and vexatious.

97. Robert S. Mirin's refusal to dismiss the Boykin II Complaint as to the Press-Enterprise on May 17, 1994 and thereafter, in the face of this Court's Order of May 17, 1994 and Mr. Mirin's admission that he could not point to a single specific act in furtherance of the claimed conspiracy on the part of Press-Enterprise was in bad faith, harassing, and vexatious.

98. Plaintiffs' counsel, Robert S. Mirin, Esquire, failed to comply with this Court's Order No. 1 of March 4, 1994.

99. Robert S. Mirin, Esquire, failed to contact all defense counsel at least 15 days prior to the case management conference and to propose three alternative dates for a pre-case management conference

between counsel was in violation of this Court's March 4, 1994 Order No. 1.

100. Plaintiffs' counsel failed to disclose witnesses as required by said Order.

101. Plaintiffs' counsel failed to disclose documents as required by said Order.

102. Robert S. Mirin's failure to attempt to schedule a pre-case management conference between counsel was in violation of Order No. 1 of March 4, 1994, frustrated the orderly resolution of this case, and placed an unusual burden on other counsel.

103. Robert S. Mirin's failure to comply with the requirements of Order No. 2 of March 4, 1994, frustrated the process for preparation of a statement of undisputed facts and created an extra burden on opposing counsel.

104. Robert S. Mirin, Esquire has acted in the matters which are the subject of this proceeding in willful bad faith.

105. Robert S. Mirin, Esquire, acted without proper regard for the rights of defendants Eyerly and the Press-Enterprise.

106. Robert S. Mirin, Esquire, flagrantly, and without justification, violated the orders of this Court.

107. Samuel E. Klein, counsel for the media defendants, is a graduate of Temple University and Temple University School of Law, having received a J.D. degree in 1971.

108. Following graduation from law school, Samuel E. Klein served as a law clerk for the Honorable Charles R. Weiner of the United States District Court for the Eastern District of Pennsylvania.

109. From 1972 to 1992, Samuel E. Klein was employed by the law firm known in 1992 as Kohn, Klein, Nast & Graf, P.C., of Philadelphia.

110. In 1992, Samuel E. Klein joined the firm of Dechert Price & Rhoads as a partner.

111. Samuel E. Klein has represented

various news media clients in the defense of defamation and privacy cases throughout his 23 years at the Bar.

112. In addition to the media defendants herein, Samuel E. Klein has represented The Philadelphia Inquirer, The Philadelphia Daily News, Capital Cities/ABC, Inc., CBS, Inc., News America Corporation, Fox Broadcasting, Newsweek, Inc., the Associated Press, and many other clients in the defense of defamation and privacy actions.

113. Samuel E. Klein is the author of The Media Survival Kit, now in its fourth edition, which is a book for working journalists distributed to reporters and editors throughout Pennsylvania.

114. Samuel E. Klein is the Pennsylvania reporter for The Libel Defense Resource Center and The Reporters Committee for Freedom of the Press and has written chapters on Pennsylvania law for inclusion in their publications.

115. Samuel E. Klein has been recognized and is listed in Who's Who in America (49th ed. 1995) and in Naifeh and Smith, Best Lawyers in America (1993-1994).

116. Samuel E. Klein possesses extensive experience and special expertise in the defense of defamation and privacy actions.

117. Samuel E. Klein represents and has represented clients (other than the media defendants herein) in the Middle District of Pennsylvania in the defense of defamation and privacy actions.

118. Specifically, Samuel E. Klein regularly represents The Wilkes-Barre Times Leader and The Bedford Gazette in the defense of defamation and privacy actions; he also represents WHP-TV in Harrisburg and has represented The York Daily Record and Susquehanna Broadcasting Corporation.

119. Samuel E. Klein has represented other publishers throughout Pennsylvania, including the New-Castle News, The

Meyersdale Republication, and The Elk County Register.

120. In all of his representation, including the representation of other clients in the Middle District of Pennsylvania, Samuel E. Klein charges and is paid his regularly hourly rate which is presently $310 per hour.

121. The rate charged by Samuel E. Klein is the rate actually paid by the media defendants herein for work done through September 30, 1994, and is the rate charged but presently unpaid for work done since September 30, 1994.

122. Samuel E. Klein's hourly rate is comparable to rates of other attorneys in Philadelphia with reasonably comparable skill, similar experience, and reputation.

123. The hourly rates of Dechert Price & Rhoads are comparable to the rates charged by other large Philadelphia law firms, and are in line with those in the Philadelphia area for attorneys of

reasonably comparable skill, experience and reputation.

124. The hourly rates of Dechert Price & Rhoads are in the upper range of rates charged by large Philadelphia law firms but are not the highest.

125. The prevailing rates for experienced federal court litigators in the Williamsport area range from $100 to $150 per hour.

126. The rates regularly charged by John M. Humphrey, Esq., an experienced litigator with more than 20 years of litigation experiences, who practices in the Williamsport area, are $150 per hour for partners and approximately $125 per hour for associates in his firm, depending on experience.

127. Businesses in the Williamsport, Pennsylvania areas frequently seek specialized counsel from larger metropolitan areas when faced with litigation requiring special attorney

expertise.

128. Defense of a defamation or privacy action is the type of matter that local businesses may be expected to seek counsel with special expertise and experience in this field from outside of the Williamsport, Pennsylvania area.

129. There is no attorney in the Williamsport, Pennsylvania area with special expertise in the defense of defamation and privacy actions or who has special experience in that field of which the Court is aware.

130. The media defendants had sufficient reason and were justified in retaining Philadelphia counsel with special expertise and extensive experience in the defense of defamation and privacy actions to defend adequately their interests in the underlying litigation.

131. There are no comparable rates in the Williamsport, Pennsylvania area for attorneys with reasonably comparable skill,

experience, and expertise in the defense of defamation and privacy actions.

132. When local businesses seeking special expertise retain counsel from outside the Williamsport, Pennsylvania area, they expect to and do pay the normal hourly rates of the retained counsel.

133. It is fair, reasonable and appropriate to utilize the regularly hourly rates of Dechert Price & Rhoads in the Philadelphia area in this action for the purposes of determining the lodestar in this sanctions motion.

134. Samuel E. Klein's representation of the media defendants herein was of the highest quality and consistent with his expertise.

135. Samuel E. Klein's hourly rate of $310 per hour, in the light of his experience and expertise, is fair and reasonable.

136. Samuel E. Klein expended a total of 15 hours in representing the media

defendants from May 17, 1994 through September 30, 1994, as follows:

May, 1994	1.40 hours	(Ex. D15 and Ex. D21, page 2)
June, 1994	7.40 hours	(Ex. D16 and Ex. D21, page 3)
July/ August, 1994	4.70 hours	(Ex. D17 and Ex. D21, page 4)
September, 1994	1.50 hours	(Ex. D18 and Ex. D21, page 5)
	15.00 hours	

137. The 15 hours expended by Samuel E. Klein was reasonable and necessary for the defense of the action.

138. The time expended by Samuel E. Klein was necessitated by the bad faith conduct of Robert S. Mirin, and represents the excess attorneys' time spent by Mr. Klein as a result of the sanctionable conduct of Mr. Mirin.

139. Samuel E. Klein expended a total of 64.70 hours during the month of October, 1994 in preparation for and the presentation of the media defendants' Motion for Sanctions (Ex. D40, page 4).

140. Robert S. Mirin's lengthy and unresponsive answers to questions posed to him during the sanctions hearing unreasonably delayed the proceedings.

141. Robert S. Mirin's constant, repeated and flagrant interruption of the Court, despite repeated warnings from the Court, unreasonably delayed the sanctions hearing.

142. Robert S. Mirin's failure to present exhibits in accordance with the procedures of Order No. 2 of March 4, 1994 caused repeated confusion during the sanctions hearing and unreasonably delayed the proceedings.

143. Robert S. Mirin's repeated attempts to offer evidence so remote and irrelevant to the issues before the Court, such as his attempt to offer evidence of the so-called "Fishing Creek Conspiracy" during the Civil War, unreasonably delayed the proceedings.

144. The sanctions hearing, which

totalled seven hearing days including the 6-day initial hearing and 1 day supplemental, was unreasonably delayed by the unreasonable conduct of Robert S. Mirin, as indicated by this Court's Findings of Fact No. 91, 103, and 141-144.

145. Under the circumstances, the 64.70 hours expended by Samuel E. Klein during October, 1994 for preparation and participation in the hearing on the Motion for Sanctions was entirely reasonable and necessary.

146. Samuel E. Klein agreed to limit his request for compensation for the continued hearing conducted on December 9, 1994, to 4.50 hours to the time actually spent while the court was in session.

147. The 4.50 hours expended by Samuel E. Klein on December 9, 1994 was reasonable and necessary.

148. Samuel E. Klein expended a total of 84.20 hours in connection with this matter for which compensation is sought, as

follows:

May - September, 1994	15.00 hours
October , 1994	64.70 hours
December 9, 1994	4.50 hours
	84.20 hours

149. The 84.20 hours expended by Samuel E. Klein were reasonable and necessary and represent the excess attorney's time spent by him as a result of the sanctionable conduct of Robert S. Mirin.

150. Jacquelyn J. Fatula is a 1989 graduate of Johns Hopkins University and received her J.D. degree from Temple University School of Law in 1992, where she was a member of the Temple Law Review.

151. Jacquelyn J. Fatula is an associate at Dechert Price & Rhoads, where she has been employed since September, 1992.

152. Since joining Dechert Price & Rhoads, Jacquelyn J. Fatula has assisted in the defense of defamation and privacy actions.

153. Jacquelyn J. Fatula's normal billing rate is $125 per hour.

154. Jacquelyn J. Fatula's rate is comparable to rates of other attorneys in the Philadelphia area with similar experience.

155. The rate charged for Jacquelyn J. Fatula is the rate actually paid by the media defendants herein.

156. Jacquelyn J. Fatula's work in this matter was of the highest quality and consistent with her experience.

157. Jacquelyn J. Fatula's hourly rate of $125 per hour is fair and reasonable.

158. Jacquelyn J. Fatula expended a total of 88.60 hours in representing the media defendants herein from May 17, 1994 through September 30, 19994, as follows:

May, 1994	6.90 hours	(Ex. D15 and Ex. D21, page 2)
June, 1994	52.20 hours	(Ex. D16 and Ex. D21, page 3)
July/August, 1994	19.25 hours	(Ex. D17 and Ex. D21, page 4)

September, 1994	10.25 hours	(Ex. D18 and Ex. D21, page 5)

88.60 hours

159. The 88.60 hours expended by Jacquelyn J. Fatula was reasonable and necessary for the defense of this action.

160. The time expended by Jacquelyn J. Fatula was necessitated by the bad faith conduct of Robert S. Mirin and represents the excess attorneys' time spent by Jacquelyn J. Fatula as a result of the sanctionable conduct of Robert S. Mirin.

161. Jacquelyn J. Fatula expended a total of 72.85 hours during the month of October, 1994 in preparation for and presentation of the media defendants' Motion for Sanctions (Ex. D40, page 4).

162. Under the circumstances, the 72.85 hours expended by Jacquelyn J. Fatula during October, 1994 for preparation and participation in the hearing on the Motion for Sanctions was reasonable and necessary.

163. Jacquelyn J. Fatula expended a

total of 161.45 hours in connection with this matter for which compensation is sought.

164. The 161.45 hours spent by Jacquelyn J. Fatula was reasonable and necessarily incurred and represents the excess hours caused by the sanctionable conduct of Robert S. Mirin and the time expended in connection with the Motion for Sanctions.

165. Vernon L. Francis is a 1982 graduate of Haverford College and received his J.D. degree from the University of Pennsylvania in 1987 where he was editor-in-chief of the Law Review.

166. Vernon L. Francis, following a judicial clerkship for The Honorable Louis H. Pollack of the United States District Court for the Eastern District of Pennsylvania, was employed by Schnader, Harrison, Segal & Lewis of Philadelphia from September, 1988 to July, 1989; thereafter, he served in the Office of the

Special Prosecutor for Iran/Contra until June, 1992.

167. Since joining Dechert Price & Rhoads in 1992, Vernon L. Francis has been engaged in the defense of defamation and privacy actions.

168. Vernon L. Francis' normal billing rate is $195 per hour.

169. Vernon L. Francis' billing rate is comparable to rates of other attorneys in the Philadelphia area with reasonably comparable skill and experience.

170. The rate charged by Vernon L. Francis is the rate actually paid by the media defendants herein.

171. Vernon L. Francis' hourly rate of $195 per hour is fair and reasonable.

172. Vernon L. Francis expended a total of 14 hours in representing the media defendants herein from May 17, 1994 through September 30, 1994, as follows:

June, 1994 5.30 hours (Ex. D16 and Ex. D21, page 3)

July/August,

1994	8.20 hours	(Ex. D17 and Ex. D21, page 4)
September, 1994	.50 hours	(Ex. D18 and Ex. D21, page 5)
	14.00 hours	

173. The 14 hours spent by Vernon L. Francis was reasonable and necessarily incurred in connection with defense of the action and preparation of the Motion for Sanctions.

174. The time expended by Vernon L. Francis was necessitated by the bad faith conduct of Robert S. Mirin and represents the excess attorneys' time spent by Vernon L. Francis as a result of the sanctionable conduct of Robert S. Mirin.

175. Sheryl J. Cohen is a 1988 graduate of the University of Pennsylvania School of Law. She was employed for 5-1/2 years by the Los Angeles, California firm of Paul, Hastings, Janofsky & Walker, and joined Dechert Price & Rhoads in April, 1994.

176. Sheryl J. Cohen's billing rate is $185 per hour.

177. Sheryl J. Cohen's billing rate is comparable to the rates of other attorneys in Philadelphia with similar skill and experience.

178. Sheryl J. Cohen's hourly rate of $185 is fair and reasonable.

179. In October, 1994, Sheryl J. Cohen expended 4.00 hours doing legal research in preparation for an anticipated motion by Robert S. Mirin to disqualify the trial judge during this hearing.

180. Although no such motion was made, Robert S. Mirin did clearly indicate in open court an intention to file such a motion.

181. Research by counsel for the media defendants in preparation of an answer to plaintiffs' counsel's anticipated motion is both necessary and proper.

182. The four hours spent by Sheryl J. Cohen was reasonably and necessarily incurred as a result of the representations made by Robert S. Mirin during the course

of the hearing on the Motion for Sanctions.

183. The fees reasonably incurred by counsel for the media defendants are as follows:

	Fees
May 17, 1994 - September 30, 1994	$19,011.25 (Ex. D21)
October, 1994 (Ex. D40)	29,965.75
December 9, 1994 hearing	1,395.00
	$50,372.00

184. The lodestar amount of fees is $50,372.00.

185. Expenses incurred in connection with presentation of the first hearing on the motion for sanctions were $2,449.90 (Ex. D40, page 6).

186. Expenses incurred in connection with the December 9, 1995 hearing on the Motion for Sanctions were $158.57.

187. The total expenses of $2,608.47 were reasonably incurred in connection with the Motion for Sanctions.

188. The expenses incurred were fair and reasonable.

189. The expenses incurred represent excess expenses caused by the sanctionable conduct of Robert S. Mirin.

190. The total fees and expenses incurred were $52,980.47.

191. The excess costs, expenses and attorneys' fees reasonably incurred by the media defendants because of Robert S. Mirin's willful bad faith and unreasonable conduct are $52,980.47.

III. Discussion.

Pursuant to 28 U.S.C. §1927, a court may impose sanctions on counsel for engaging in conduct that "multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. §1927 (1980). Under §1927, a court may require that counsel personally satisfy "the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." Id. Sanctions under §1927 are directed at the offending attorney and may

not be imposed upon his clients. Williams vs. Giant Eagles Markets, Inc., 883 F.2d 1184, 1190 (3d Cir. 1989).

A requisite element to impose sanctions under §1927 is a finding of willful "bad faith." Willams, 883 F.2d at 1190-91; Ford vs. Temple Hosp., 790 F.2d 342, 347 (3d Cir. 1986). A district court may impose sanctions if it finds the "'plaintiff's actions was frivolous, unreasonable, or without foundation, even though not in subjective bad faith.;" Ford, 290 F.2d at 350, quoting Christianburg Garment Co. vs. EEOC, 43 U.S. at 421-22. The Court of Appeals for the Third Circuit has stated that the "intentional advancement of a baseless contention that is made for an ulterior purpose, e.g., harassment or delay" may be indicative of bad faith. Id. at 347. Similarly, sanctions are appropriate under §1927 where a party continues to pursue claims after having been formally or informally notified that

these claims were barred by the statute of limitations. See Fred A. Smith Lumber Co. vs. Addition, 845 F.2d 750 (7th Cir. 1988); Matthews vs. Freedman, 128 F.R.D. 194, 207 (E.D. Pa. 1989) (Gawthrop, J.). A finding of "bad faith" is a factual determination to be made by the court.

Under §1927, even if a lawsuit was initially filed in good faith, sanctions may be imposed on an attorney for all costs and fees incurred after the continuation of the suit which is deemed to be in bad faith. Id. See Ford, 790 F.2d at 350.

Furthermore, "[o]nce a finding of bad faith has been made, the appropriateness of sanctions is a matter entrusted to the discretion of the district court." Quiroga vs. Hasbro, Inc., 934 F.2d 497, 505 (3d Cir. 1991), citing Hackman vs. Valley Fair, 932 F.2d 239, 242 (3d Cir. 1991), cert. denied, 112 S.Ct. 376 (1991).

Additionally, this Court has the inherent powers to impose sanctions,

including attorney's fees, on counsel for bad faith conduct. Chambers vs. Nasco, Inc. ___ U.S. ___, 111 S.Ct. 2123, 2134 (1991). This Court's inherent power to impose sanctions for such conduct is not displaced by statute or by rule. Id. at 2134-35. Sanctions may be imposed "to promote judicial efficiency, and to deter abuse of judicial process." Quiroga, 934 F.2d at 505. Under this inherent power, a court may award attorney's fees and require that counsel pay them personally, if it is found that he acted in bad faith. Landon vs. Hunt, 938 F.2d 450, 454 (3d Cir. 1991).

A review of the Boykin I and Boykin II complaints makes clear that the Plaintiffs had no basis in fact or law for their defamation claims and their assertion of civil rights offenses against the media defendants was patently frivolous. Indeed, Mr. Mirin did not have in his possession any articles claimed to be false and defamatory at the time he filed the Boykin

I and Boykin II complaints or at the time he refused to dismiss Boykin II.

Although Mr. Mirin's good faith in filing Boykin I is doubtful, it cannot be seriously questioned that the filing and pursuit of the claims in Boykin II were frivolous and outrageous. First, when the Boykin II complaint was filed, Eyerly was no longer a defendant in this matter and had been dismissed pursuant to a state court order. Second, at the time the Boykin II complaint was removed to federal court, the Plaintiffs' identical claims against the media defendants had already been dismissed on their merits. Third, after having been given written notice that Plaintiffs could not assert claims as to Defendant Eyerly, that Plaintiffs' state law claims were time-barred and that the media defendants intended to seek counsel fees, Mr. Mirin refused to withdraw these claims.

In fact, Mr. Mirin was put on notice two

time by the media defendants and once by this Court that his state law claims as to the Press-Enterprise were time barred. Mr. Mirin, however, continued to pursue these time-barred claims. Thus, Mr. Mirin unreasonably and unnecessarily forced the media defendants to file a second motion to dismiss and to participate in preparing the case management plan for this case.

Mr. Mirin's clients would in no way have been prejudiced by the dismissal of the Boykin II complaint as it presented issues identical to those raised in the Boykin I complaint.

By continuing to maintain this action, by continuing to cause the media defendants to incur significant legal fees and expense, and by continuing to burden this Court with the identical arguments already rejected, Mr. Mirin has violated his duty to proceed in good faith and in a manner designed to achieve justice. The media defendants should simply not be subjected

to such outrageous conduct and be burdened with the cost and expense of repeatedly litigating the same claims.

We are of the view that sanctions should be imposed on Mr. Mirin because he has engaged in bad faith, harassing and vexatious litigation by pursuing these claims, which has so multiplied the proceedings in this case as to cause unnecessary burden and expense on the media defendants.

The standard utilized to calculate the proper award of attorney's fees under 28 U.S.C. §1927 is the lodestar method. The lodestar fee is calculated by multiplying a reasonable hourly rate by the number of hours reasonably expended on the suit. Matthews vs. Freedman, 128 F.R.D. at 207. See also Hensley vs. Eckerhart, 461 U.S. 424, 433 (1983).

The sanctions hearing, which totalled seven days including the 6-day initial hearing and 1 day supplemental hearing, was

inordinately delayed by the unreasonable conduct of Mr. Mirin and his grossly evasive and lengthy answers to questions while on the stand, as indicated by this Court's Findings of Fact No. 91 and 103. Mr. Mirin's constant and flagrant interruption of this Court, despite repeated warnings, further delayed the sanctions hearing. Moreover, Mr. Mirin's repeated attempts to offer evidence remote and irrelevant to the issues before the Court also unreasonably delayed these proceedings, as indicated by this Court's Findings of Fact No. 141-44.

Under these circumstances, the total number of hours expended by counsel for the media defendants in connection with this matter was entirely necessary and reasonable and represents the excess attorney's time spent by them as a result of the bad faith and sanctionable conduct of Mr. Mirin, as indicated by this Court's Findings of Fact No. 148, 149, 163, 164,

172, 173, 174, and 182.

In addition, the hourly rates claimed by each individual attorney assisting in the representation of the media defendants reflect the actual hourly rates paid by the media defendants and are reasonable based on the respective skills and experience of counsel for such defendants, as indicated by this Court's Findings of Fact.

The lodestar amount of fees is $50,372, as indicated by this Court's Finding of Fact No. 184. The total expenses incurred in connection with the presentation of both sanctions hearings is $2,608.47. These expenses were reasonably incurred and represent excess expenses caused by the sanctionable conduct of Mr. Mirin, as indicated by this Court's Findings of Fact No. 185-189. As a result, the lodestar of fees and expenses caused by the sanctionable conduct of Mr. Mirin and incurred by the media defendants is $52,980.47. We are of the view that there

are no reasons to depart upwards or downwards from the lodestar.

We are aware that the amount of sanctions imposed may seem high. However, they reflect the regular hourly rates of counsel for the media defendants and to impose less would put additional costs on the media defendants. Were we to do otherwise, we may deter an aggrieved party from instituting an action for sanctions because a wrongdoer may so multiply the sanctions proceedings that the wronged party may be required to pay additional counsel fees in connection with the motion for sanctions, thus chilling its right to move for sanctions.

IV. Conclusions of Law.

1. Pursuant to 28 U.S.C. § 1927, this Court may impose sanctions on counsel for engaging in conduct with "multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927 (1980).

2. Under § 1927, counsel "may be

required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927 (1980).

3. Robert S. Mirin acted in willful bad faith in this case as set forth in the findings of fact.

4. The legal theories enunciated by Mr. Mirin were pursued and maintained in bad faith.

5. Robert S. Mirin acted in this case in a manner which was unreasonable and the legal theories on which he relied relating to libel and invasion of privacy were without foundation.

6. In light of Robert S. Mirin's conduct in continuing to pursue claims of libel and invasion of privacy against the media defendants in bad faith after being notified that such claims were time-barred, sanctions should be imposed upon plaintiff's counsel.

7. Sanctions will be imposed upon Robert

S. Mirin to deter abuse of the judicial process, to promote judicial efficiency and to penalize him for his bad faith conduct.

8. The standard utilized to calculate the proper award of attorney's fees under 28 U.S.C. § 1927 is the lodestar method.

9. The total number of hours expended by counsel for the media defendants in connection with this action is reasonable.

10. The hourly rates claimed by each individual attorney assisting in the representation of the media defendants are reasonable based on their respective skills and experience.

11. The lodestar amount of fees incurred by the media defendants is $50,372.00.

12. The lodestar amount of $50,372.00 is reasonable.

13. The lodestar of fees and expenses incurred by counsel for the media defendants as a result of Robert S. Mirin's willful bad faith and unreasonable conduct

was $52,980.47.

14. The lodestar amount of fees represents the fair and reasonable value of the services rendered, taking into account the novelty and complexity of the issues presented in the case, the special skills and experience of counsel involved, the quality of the representation and the result achieved.

15. Robert S. Mirin unnecessarily and in bad faith protracted the proceedings regarding the Motion for Sanctions.

16. Robert S. Mirin's conduct before and during the hearing on the Motion for Sanctions caused undue burden and expense to the media defendants.

17. The media defendants should not be penalized in their request for an award of sanctions because of the unreasonable conduct of Robert S. Mirin in protracting the proceeding and thereby increasing the cost to defendants.

18. It would violate and frustrate the

Congressional policy behind 28 U.S.C. § 1927 to permit an attorney to make the process of seeking sanctions against him for willful, bad faith conduct so prohibitively expensive so as to deter parties from seeking to recover sanctions.

19. Robert S. Mirin should bear full legal responsibility for the fees and costs reasonably incurred as a result of the unnecessarily protracted sanctions proceedings.

20. There is no reason to depart upwards or downwards from the lodestar.

21. Sanctions will be imposed on Robert S. Mirin in the amount of $52,980.47.

An appropriate order will be entered.

_____

MUIR, U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL R. BOYKIN, et al.,	:	
Plaintiffs	:	No. 4:CV-94-306
v.	:	Complaint Filed 3/2/94
BLOOMSBURG UNIVERSITY OF PENNSYLVANIA, et al.,	:	(Judge Muir)
Defendants	:	

ORDER

January , 1995

1. Judgment is entered against Robert S. Mirin, Esq. personally and in favor of Paul Eyerly, III, and Press Enterprise, Inc., in the amount of $52,980.47.

2. Robert S. Mirin shall pay to Paul Eyerly, III and Press Enterprise, Inc., within 120 days the sum of $52,980.47.

MUIR, U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-7456

MICHAEL R. BOYKIN; MARGARET L. BOYKIN;
AARON M. BOYKIN

v.

BLOOMSBURG UNIVERSITY OF PENNSYLVANIA;
DR. ROBERT PARRISH, Vice President;
DR. CURTIS ENGLISH, President;
DR. HARRY AUSPRICH, Former President;
MARGARET MANNING, Director of Personnel;
IRVIN WRIGHT, Associate Professor;
JOHN WALKER, Retired Vice President for University Advancement; VIRGINIA MCAFEE, Ex-University Employee;
LT. DEBORAH BARNES, University Police Force;
WILLIAM S. KREISHER, Esquire;
PAUL EYERLY, III, Publisher;
PRESS ENTERPRISE NEWSPAPER

Michael Boykin; Margaret Boykin;
Aaron Boykin; Robert S. Mirin,
Appellants

AMENDED PETITION FOR REHEARING

AND NOW comes Petitioner, Robert S. Mirin, and herewith files a Petition for Rehearing pursuant to Rules 40 of the Federal Rules of Appellate Procedure and Rule 35.4 of the Third Circuit LAR. In support of the request, counsel, pro se, avers as follows:

1. The decision of the Court does not address any of the 293 instances during the sanction hearings when the Court systematically interrupted Plaintiffs' attorney and demonstrated bias and predisposition concerning the handling and presentation of Plaintiffs' case.

See, RR, 1580 (ll 6-7 and 25-np); 1584 (ll 25-np); 1586 (ll 10-11); 1587 (ll 9-10); 1588 (ll 22-23 and 25-np); 1595 (ll 9-10); 1613 (ll 6-7); 1623 (ll 22-24); 1661 (ll 20-21); 1664 (ll 1-2); 1665 (ll 7-8); 1666 (ll 12-13 and 18-19); 1667 (ll 22-23); 1682 (ll 15-16 and 17-18 and 22-23); 1686 (ll 5-6); 1696 (ll 1-2 and 3-4- and 6-7); 1697 (ll 1-2); 1710 (11 20-21 and 25-np); 1711 (ll 10-11); 1712 (ll 23-24); 1732 (ll 4-5); 1756 (ll 2-3); 1758 (ll 3-4 and 6-7 and 10-11 and 14-15 and 18-19 and 22-23 and 25-np); 1760 (ll 3-4); 1761 (ll 11-12 and 20-21); 1762 (ll 11-

12 and 20-21); 1762 (ll 15-16); 1765 (ll 18-19); 1773 (ll 5-6 and 9-10); 1778 (ll 13-14); 1779 (ll 1-2); 1785 (ll 25 np); 1804 (ll 25-np); 1815 (ll 17-18); 1816 (ll 8-9 and 19-20); 1838 (ll 21-22); 1842 (ll 17-18 and 23-24); 1843 (ll 17-18); 1844 (ll 6-7); 1853 (ll 7-8 and 11-12 and 25-np); 1855 (ll 4-5 and 16-17); 1857 (ll 7-8 and 13-14); 1858 (ll 10-11 and 15-16); 1861 (ll 14-15); 1865 (ll 23-23); 1866 (ll 2-3 and 24-25); 1867 (ll 2-3 and 10-11); 1868 (ll 10-11); 1878 (ll 2-3 and 9-10 and 15-16 and 17-18 and 21-11); 1879 (ll 6-7 and 10-11 and 25-np); 1883 (ll 15-16); 1884 (ll 3-4); 1895 (ll 24-25); 1944 (ll 6-7 and 17-18); 1946 (ll 17-18) 1952 (ll 18-19); 1962 (ll 21-22); 1963 (ll 12-13); 1967 (ll 6-7); 1973 (ll 14-15); 1980 (ll 7-8); 1985 (ll 3-4); 1994 (ll 4-5); 2003 (ll 4-5); 2027 (ll 12-13 and 20-21); 2030 (ll 14-15); 2031 (ll 8-9); 2032 (ll 20-21); 2034 (ll 16-17); 2046 (ll 20-21); 2061 (ll 3-4); 2080 (ll 24-25); 2082 ll 4-5); 2090 (ll 18-19 and 23-24); 2091 (ll 19-20); 2094 (ll 24-25); 2096 (ll 24-25); 2097 (ll 8-9 and 20-21); 2099 (ll 24-25); 2103 (ll 13-14); 2105 (ll 6-7); 2110 (ll 8-9); 2116 (ll 18-19 and 23-24); 2118 (ll 7-8); 2125 (ll 12-13); 2129 (ll 21-22); 2131 (ll 6-7); 2131 (ll 18-19); 2132 (ll 6-7 and 18-19 and 25-np); 2133 (ll 25-np); 2134 (ll 5-6 and 10-11 and

22-23); 2145 (ll 13-14); 2146 (ll 4-5 and 7-8); 2147 (ll 24-25); 2148 (ll 17-18); 2155 (ll 8-9); 2176 (ll 1-2 and 10-11); 2177 (ll 23-24); 2178 (ll 3-4 and 19-20); 2184 (ll 24-25); 2185 (ll 11-12); 2186 (ll 7-8 and 25-np); 2195 (ll 15-16); 2197 (ll 13-14); 2203 (ll 19-20); 2211 (ll 17-18 and 21-22); 2216 (ll 8-9); 2218 (ll 1-2 and 7-8); 2220 (ll 10-11 and 14-15); 2229 (ll 10-11); 2231 (ll 8-9 and 23-24); 2235 (ll 3-4); 2250 (ll 23-24); 2256 (ll 9-10 and 12-13); 2294 (ll 12-13); 2306 (ll 6-7); 2313 (ll 14-15); 2334 (ll 11-12 and 17-18 and 24-25); 2337 (ll 19-20); 2344 (ll 23-24); 2353 (ll 2-3); 2361 (ll 17-18); 2366 (ll 2-3); 2361 (ll 17-18); 2366 (ll 2-3); 2371 (ll 13-14); 2374 (ll 20-21); 2376 (ll 4-5); 2377 (ll 1-2); 2388 (ll 25-np); 2389 (ll 23-24); 2395(ll 16-17); 2396 (ll 3-4); 2404 (ll 9-10); 2405 (ll 1-2 and 9-10); 2407 (ll 13-14); 2408 (ll 23-24); 2415 (ll 21-22); 2418 (ll 19-20 and 23-24); 2420 (ll 22-23); 2421 (ll 25-np); 2427 (ll 8-9); 2431 (ll 16-17 and 24-25); 2431 (ll 13-14); 2433 (ll 5-6 and 9-10 and 22-23); 2445 (ll 1-2 and 18-19); 2447 (ll 8-9); 2449 (ll 3-4); 2450 (ll 6-7 and 18-19); 2454 (ll 1-2); 2456 (ll 8-9); 2461 (ll 18-19); 2462 (ll 9-10 and 16-17); 2472 (ll 2-3 and 24-25); 2474 (ll 12-13 and 25-np); 2489 (ll 3-4); 2485 (ll 23-24); 2487 (ll 7-8); 2488 (ll 9-

10); 2489 (ll 7-8); 2495 (ll 8-9); 2508 (ll 7-8 and 13-14); 2516 (ll 25-np); 2518 (ll 8-9); 2519 (ll 11-12); 2520 (ll 4-5); 2538 (ll 1-2); 2552 (ll 18-19); 2553 (ll 25-np); 2559 (ll 6-7 and 16-17 and 21-22); 2581 (ll 18-19) 2586 (ll 6-7); 2587 (ll 9-10); 2588 (ll 2-3); 2591 (ll 18-19); 2596 (ll 15-16); 2601 (ll 13-14); 2604 (ll 6-7);2606 (ll 14-15); 2608 (ll 7-8 and 9-10 and 14-15 and 18-19); 2609 (ll 5-6 and 8-9); 2615 (ll 13-14); 2617 (ll 3-4); 2624 (ll 11-12); 2643 (ll 8-9); 2652 (ll 15-16); 2675 (ll 12-13); 2683 (ll 24-25); 2687 (ll 19-20); 2717 (ll 23-24); 2719 (ll 6-7); 2721 (ll 2-3); 2724 (ll 14-15); 2757 (ll 20-21); 2758 (ll 6-7); 2782 (ll 4-5 and 17-18); 2795 (ll 19-20); 2795 (ll 19-20); 2803 (ll 23-24); 2814 (13-14); 2816 (ll 9-10); 2844 (ll 23-24); 2864 (ll 7-8- and 24-25); 2865 (ll 2-3); 2866 (ll 7-8); 2870 (ll 19-20); 2874 (ll 13-14); 2877 (ll 13-14); 2881 (ll 16-17);2886 (ll 20-21); 2887 (ll 20-21); 2891 (ll 11-12 and 25-np); 2894 (ll 22-23); 2895 (ll 5-6); 2896 (ll 20-21); 2897 (ll 12-13); 2898 (ll 1-2); 2899 (ll 17-18 and 25-np); 2900 (ll 6-7);

The above citations to the sanctions record, taken together, reflect systematic interruption of Plaintiff's attorney by the court. Since the court issued its sanctions findings without benefit of transcript and

prepared findings prior to the completion of the October week of testimony, the senior judge's apparent hearing and comprehension deficit are significant indicators of another serious deficiencies replete in the sanctions determination and assessment.

2. The disposition of the Court does not address any of the 98 referenced incidents where the senior judge in question demonstrated a hearing deficit and/or comprehension deficit concerning the proceedings in the courtroom.

See, RR, 1564 (ll-17); 1567 (ll 11-12); 1568 (ll 4-14); 1595 (ll 7-12); 1598 (ll 16-17); 1599 (ll 9-10); 1603 (ll 15-16); 1636 (ll 15-16); 1639 (ll 17-np); 1643 (ll 22-24); 1662 (ll 22-23); 1671 (ll 2-3); 1679 (ll 18-19 and 23-24); 1700 (ll 14-15); 1721 (ll 1-2); 1722 (ll 17-18); 1728 (ll 22-23); 1747 (ll 25-np); 1750 (ll 16-17); 1760 (ll 15-16); 1776 (ll 8-9); 1783 (ll 4-5); 1799 (ll 11-12); 1806 (ll-15); 1812 (ll 13-14); 1813 (ll 21-22) 1864 (ll 1-3); 1878 (ll 24-25); 1901 (ll 6-8); 1903 (ll 20-21); 1916 (ll 5-8); 1917 (ll 2-3); 1980 (ll 7-8); 1986 (ll 16-19); 1987 (ll 13-14); 1989 (ll 2-3); 1992 (ll 8-11); 2001 (ll 3-4); 2004 (ll 21-23); 2007 (ll 1-2); 2008 (ll 24-25); 2016 (ll-18); 2061 (ll 22-23); 2086 (ll 6-8);

2088 (ll 20-21); 2093 (ll 5-6); 2098 (ll 5-7); 2105 (ll 6-11); 2119 (ll 15-18); 2127 (ll 21-23); 2133 (ll 7-10); 2136 (ll 5-9); 2148; 2177 (ll 8-9); 2244 (ll 21-24); 2261 (ll 19-21); 2275 (ll 13-14); 2315 (ll 19-20); 2346 (ll 1-2); 2364 (ll 11-18); 2366 (ll 10-11); 2368 (ll 24-25); 2377 (2-3 and 11-12); 2378 (ll-1); 2435 (ll 3-6); 2440 (ll 23-np); 2442 (ll 8-10); 2460 (ll 1-2); 2471 (ll 16-18); 2475 (ll 6-7); 2487 (ll 18-20); 2509 (ll 22-23); 2510 (ll 1-2); 2519 (ll 2-4); 2551 (ll 17-19); 2571 (ll 18-19); 2586 (ll 14-15); 2588 (ll 15-17); 2595 (17-18); 2600 (ll 17-18); 2601 (ll 17-18); 2605 (ll 13-14); 2611 (ll 23-24); 2621 (ll 19-20) 2641 (ll 22-24); 2646 (19-20); 2674 (ll 23-25); 2685 (ll 5-17); 2732 (ll 17-19); 2749 (ll 18-19); 2768 (ll 12-14); 2810 (ll 7-9); 2814 (ll 9-11); 2826 (ll 2-3); 2831 (ll 24-25); 2846 (ll 16-17);

These components in the record frankly disclose the learned judge's acknowledged hearing deficit and impairment which, in the absence of a record, impugn the accuracy of the learned judge's determination in the sanctions settings.

See also, RR, 1562 (ll 21-np); 1572 (ll 22-24); 1573 (ll 18-19); 1583 (ll 3-5); 1603 (ll 18-24); 1619 (ll 6-7);

As with other citations to the record these citations reflect the frank confusion of the learned senior judge below as to the information disseminated and events occurring in the courtroom; further supporting the inference that the judge's sanction's findings constitute an arbitrary abuse of discretion.

3. The decision does not address any of the 49 cited instances where the judge demonstrated a predisposition and bias against Plaintiffs' counsel in the presentation of its case.

See, RR 1580; 1581; 1586 (ll 17-25); 1596 (ll 10-25); 1617 (ll 18-25); 1624 (ll 10-20); 1625 (ll 9-11); 1629 (ll 9-12); 1631 (ll 5-25); 1633 (ll 14-16); 1646; 1659 (ll 18-24); 1667 (ll 23-24); 1696 (ll 12-13); 1756 (ll 6-9); 1766; 1946 (ll 20-22); 2125 (ll 1-22); 2176 (ll 10-11); 2183 (ll 1-19); 2186 (ll 8-10); 2187 (ll 1-14); 2194 (ll 17-18); 2195 (ll 1-14); 2196 (ll 6-7); 2197 (ll 2-4); 2218 (ll 1-10); 2220 (ll 15-17); 2229 (ll 11-16); 2256 (ll 13-18); 2313 (ll 12-21); 2334 (ll 3-4); 2403 (ll-1); 2405 (ll 2-6); 2411 (ll 14-18); 2431 (ll 22-on); 2449 (ll 1-2); 2492; 2575; 2590 (ll 10-14); 2605 (ll 7-24); 2620 (ll 18-19); 2626 (ll 21-24); 2734 (ll 14-15); 2772 (ll 2-7); 2807; 2816 (ll 6-13); 2837; 2870 (ll 20-

on);

The above referenced citations to the sanctions transcripts, taken together, reflect the learned judges below's arbitrary predisposition and bias directed toward Plaintiff's counsel and case.

4. Counsel was precluded from developing a record to defend against any allegation of bad faith under the Court's inherent authority and jurisdiction concerning sanctions as to matters before the Lower Court. (See, for example, Transcript Vol. 2, October 24,1994 pgs. 34, 40-41; Transcript Vol. 4, October 26, 1994 pgs. 149-150, 197-199, 201-202).

5. The Rule of Professional Conduct 3.1, applicable to practice in Pennsylvania, provide impertinent part "...a lawyer should not bring or defend a proceeding, or assert or convert an issue therein unless there is a basis for doing so that is not frivolous, which includes good faith argument for the extension, modification or reversal of existing law. ..." In this regard, the Panel, in its decision did not address Plaintiff's argument that under then recent Supreme Court decisional law Employment Division v. Smith, 494 U.S. 892 (1990),

Appellant advocated the limitation of First Amendment freedom of press, based upon a statute of general applicability, 42 U.S.C. §1983.

6. While the Smith case involved religious freedom under the First Amendment, the language of the decision indicates that there are occasions when the broad scope of a First Amendment right may be limited. Counsel sought to extend and apply this theory in connection with the underlying litigation in this matter.

7. The Panel makes several observations, in passing, which critically noted the vigorous advocacy of counsel. The Canons supported the filing of the theory seeking to bring the newspaper within the scope of Section 1983 and related Post Civil War Civil Rights statutes. Thus, for example, the Panel's critically notes, passim, attempts to reference history in the area (The Fishing Creek Conspiracy), involving an effort on the part of this section of Pennsylvania to succeed from the Union during the Civil War, as constituting evidence remote and irrelevant to the issues before the Court.

8. The lower court was directed, inter alia, to studies of the Pennsylvania Human Relations Commission pertaining to the recency and prevalence of race hate crimes in the area and the averments before the lower Court involved, inter alia, race hate mail and the burning of a cross on the steps of the Administration Building for Bloomsburg University at the time of the hiring of Margaret Boykin. Thus, the historical setting and cultural mileau of the area are arbitrarily dismissed by the lower Court and the Panel.

9. The lower court decision ignores record evidence to the effect that experienced counsel were available in the Williamsport area at $100.00 an hour in order to prosecute any sanctions hearing and inappropriately applied a $710.00 an hour effective rate to the proceedings.

10. The decision, without analysis, characterizes counsel's testimony in the sanctions hearing, testimony which did not consume any more than a total of one (1) day's proceeding out of seven (7) as extending the hearings concerning the imposition of sanctions under 28

U.S.C. §1927. The general references, passim, to the length of hearings contained no discussion or analysis of the limitations of the hearing day imposed by the sitting senior judge, the actual extent of counsel's testimony, nor the extent to which the proceedings involved with Movant's case or testimony. For example, there is not a single citation to the record to support the undocumented assertion that the replies of counsel were inappropriately evasive or inappropriately lengthy and the assertion is not supported in the decision of the Lower Court or it's conclusions which are without any citation to the record.

11. It was not explained, in the decision, why the described sequence of events did not provide a reasonable basis in fact and law for the defamation or privacy claims involved. Although, the Court notes, in passing, that Plaintiffs did not even live in the area during the period of time when the so-called serial rapes were committed, the related underlying claim and legal theory are dismissed without analysis.

12. The senior judge, at the time of the hearings, admitted that he had hearing impairment and diabetes at the time of the

proceedings. These are conditions which can and do affect the ability of anyone to perceive and digest complex intellectual proceedings.

13. With regard to the issue of the use of historical evidence, the tradition of a "Brandeis Brief" aside, the observations of historian/philosopher George Santianna that "...Those who do not learn from the past are condemned to repeat it..." conjoined with our recent societal experience which includes an outbreak of arson involving black churches in the South, and the racial harassment of a black American in the city of Philadelphia driving her from a neighborhood. Such events illustrate that the issue(s) of racial discrimination, while not always easily apparent, continue(s) to virulently exist in our society.

14. No where in the decision is there an explanation of how the Movants initially managed to generate in excess of $19,000.00 in billable time in connection with a response to the virtually identical (state) second complaint - A complaint which was mandated under State law by the actions of the Commonwealth of Pennsylvania ruling Plaintiffs and requiring the second complaint.

15. The actions of the decision of the Court does not address

comity issues in the sense that the allegedly duplicative complaint, which was compelled by State court process of a third party, and was identical to the first complaint filed and removed by a third party (the Commonwealth) to the Federal Court. See GRiD Sys. Corp. v. John Fluke Mfg. Co., 41 F3d 1318 (9th Cir. 1994).

16. Also, these sanctions issues arose in the context of a pending state court Motion to Strike an improperly entered judgment of non pros and involved counsel's concern over the possibility of waiver by implication if the Press Enterprise were not named in the state complaint. Subsequently, given the then interlocutory disposition of the first complaint, as to the Press Enterprise or publisher Eyerly, there was a risk that a Court would view the omission of the Press Enterprise and the editor from the second complaint as a waiver of all claims against those defendants. Thus, if the second complaint became the operative complaint in Federal Court, a waiver argument could have resulted from the omission of the newspaper and editor in the second/removed complaint and an arguable or potential loss of appeal right could have resulted from that omission.

17. The Panel, without analysis, references the lower court's 23 page opinion, which is itself devoid of specific record references or examples and which was announced prior to the completion of the hearing process. The decision reflects a persistent pattern of clear error.

18. The use of state court process as a basis for §1927 sanctions violates the principals of comity and ordered federalism. See Younger v. Harris, 401 U.S. 37 (1971).

WHEREFORE, Appellants respectfully request this Honorable Court to reconsider the June 12, 1996 Memorandum and Decision and strike the imposition of sanctions as inappropriate and unsupported.

Respectfully submitted,

MIRIN & JACOBSON

DATED: July 2, 199By: _____

Robert S. Mirin
Attorney ID# 25305
Attorney for Appellants

8150 Derry Street
Harrisburg, PA 17111-5260
(717) 561-1515
boyk625.pet

CERTIFICATE OF SERVICE

I, Robert S. Mirin, do hereby certify that I served a true and correct copy of the foregoing Petition for Rehearing upon the following persons in the manner indicated below:

FIRST CLASS MAIL

Samuel E. Klein, Esquire
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793

Hugh J. Hutchison, Esquire
1515 Market Street, 18th Floor
Philadelphia, PA 19102

Sarah Bricknell, Esquire
Buchanan & Ingersol
30 North Third Street, 8th Floor
Harrisburg, PA 17101

R. Douglas Sherman, Esquire
Office of Attorney General
Strawberry Square, 15th Floor
Harrisburg, PA 17120

DATED: July 2, 199By: _____

Robert S. Mirin

LOCAL RULE 35.1 CERTIFICATION

I, express a belief, based on a reasonable and studies professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court, i.e., the panel's decision is contrary to the decision of the Supreme Court, and this appeal involves a question of exceptional importance, i.e., the limitation of First Amendment freedom of press by statutes of general applicability such as 42 U.S.C. §1983, and expansion of Employment Div. v. Smith, 494 U.S. 892 (1990). Also, the Panel's decision is at odds with established precedent, such as GRiD Sys. Corp. v. John Fluke Mfg. Co., 41 F3d 1318 (9th Cir. 1994).

Robert S. Mirin